Supreme Court, U.S.
FILED
SEP 17 1991
OFFICE OF THE CLERK

No. 91-457

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

EDWIN S. NUTBROWN, *et al.*,
Petitioners,

v.

RICHARD A. MUNN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

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September 16, 1991

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QUESTIONS PRESENTED

1. Where a state's courts otherwise entertain actions under 42 U.S.C. § 1983, may plaintiffs be required to exhaust state administrative remedies before bringing a state court suit under § 1983, in which the facial constitutionality of a state taxing scheme is challenged, and declaratory and injunctive relief are sought, and damages from state taxing officials in their individual capacities are sought?

2. If exhaustion of state administrative remedies may be required as a condition of bringing a § 1983 action involving a state tax in state court, is the exhaustion requirement excused either where the administrative remedy is wholly inadequate or where the exhaustion of the administrative remedy would be futile?

3. Whether conditioning the right to post-deprivation relief from taxes collected in violation of 4 U.S.C. § 111 upon the exhaustion of inadequate and/or futile state administrative remedies satisfies a state's obligation under the Due Process Clause of the Fourteenth Amendment to provide a clear and certain remedy?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Oregon Supreme Court were: (1) Petitioners Edwin S. and Agnes D. Nutbrown, Donald R. and Theresa Paape, Howard R. and Margaret E. Cleary, Norman L. Minks and Gloria Minks' Successor-in-Interest,* James M. and Margaret Jackson, Elenor Jean and Felix Erro, James F. Simpson and Terri D. Dill-Simpson, Louis Z. and Lorna K. Perkins on behalf of themselves and on behalf of all others similarly situated;** and (2) Respondents Richard A. Munn, individually and as Director of the Department of Revenue of the State of Oregon, Robyn Godwin and John J. Lobell, individually, and the Department of Revenue of the State of Oregon.

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* Gloria Minks died during the pendency of the appeal before the court below. The Oregon Supreme Court substituted her successor-in-interest as a party to the appeal. Petitioner Norman L. Minks is Mrs. Minks' successor-in-interest.

** At the time the Oregon Tax Court granted the respondents' motion to dismiss, petitioners' motion to certify this case as a class action on behalf of approximately 40,000 similarly situated civilian and military annuitants of the federal government was pending but not heard. Transcript of Record ("TR") 46.

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Edwin S. Nutbrown, Agnes D. Nutbrown, Donald R. Paape, Theresa Paape, Howard R. Cleary, Margaret E. Cleary, Norman L. Minks, Gloria Minks' Successor-in-Interest, James M. Jackson, Margaret Jackson, Elenor Jean Erro, Felix Erro, James M. Simpson, Terri D. Dill-Simpson, Louis Z. Perkins and Lorna K. Perkins, respectfully petition this Court for a writ of certiorari to the Supreme Court of Oregon.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (App. A, *infra*, at 1a-26a) is reported at 311 Or. 328, 811 P.2d 131. The opinion of the Oregon Tax Court (App. D, *infra*, at 32a-38a) is reported at 11 OTR 294. The judgment of the Oregon Tax Court (App. E, *infra*, at 39a) is unpublished.

JURISDICTION

The Supreme Court of Oregon issued its opinion on May 9, 1991 affirming the Oregon Tax Court and denying petitioners' entitlement to prosecute this § 1983 action. App. A at 1a. Petitioners' timely petition for reconsideration was denied on June 20, 1991. App. B, *infra*, at 27a-28a. The appellate judgment of the Supreme Court of Oregon was issued on July 8, 1991. App. C, *infra*, at 29a-31a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111 provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Pertinent provisions of Oregon's statutory scheme of administrative remedies for income taxes are set forth in App. F, *infra*.

STATEMENT OF THE CASE

This case arises in the wake of this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989). In *Davis*, this Court held that state taxing schemes which discriminate in favor of local and state retirees and against federal retirees are invalid under 4 U.S.C. § 111. Oregon, like Michigan and approximately twenty other states, exempted the benefits of many retired employees of state and local government from state income taxation while taxing federal pensions. App. A at 4a.

On June 19, 1989, the petitioners, retired civilian and military employees of the federal government, commenced an action in the Oregon Tax Court challenging the constitutionality of Oregon's discriminatory taxing scheme and seeking, *inter alia*, declaratory and injunctive relief and damages under 42 U.S.C. § 1983. The petitioners also sought certification of the class of retired federal employees similarly situated to the named plaintiffs. In addition, the petitioners sought relief pursuant to various

state law claims, including, *inter alia*, a claim for tax refund.[1]

On September 6, 1989, petitioners moved the tax court for a declaration that Oregon's discriminatory taxing scheme, which exempts the pensions of state and local retirees under ORS §§ 237.201 and 316.680(1)(c) and (d), violates 4 U.S.C. § 111 and principles of intergovernmental tax immunity by favoring state and local government employees over retired federal employees, and is therefore invalid and unenforceable. TR. 222. The petitioners also moved for an order certifying the plaintiff class.

Simultaneous with petitioners' motions, defendants filed a motion to dismiss asserting various jurisdictional and affirmative defenses, including that the petitioners had failed to state a cause of action under § 1983 and had failed to exhaust administrative remedies. TR. 259. In a memorandum decision dated October 4, 1989, the tax court dismissed the action for lack of subject matter jurisdiction on the basis that plaintiffs had not exhausted administrative remedies. App. D at 32a-38a. The court entered judgment on October 18, 1989, reflecting the rulings of its memorandum decision. App. E at 39a. As a consequence of the court's ruling, oral argument was not heard on plaintiffs' then pending motions for declaratory judgment and class certification.

The petitioners filed an appeal to the Oregon Supreme Court seeking reversal of the tax court's decision. In a published decision dated May 9, 1991, the Oregon Supreme Court affirmed the tax court's decision. It held that, in an action involving state taxes, a state may

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[1] Immediately upon the commencement of this case, the petitioners moved the Oregon Tax Court for a temporary restraining order to enjoin the defendants from collecting or otherwise attempting to enforce the discriminatory scheme during the pendency of the litigation. On June 21, 1989, the tax court denied the petitioners' motion for a temporary restraining order. TR. 147.

impose an exhaustion requirement upon a claim premised upon § 1983 without offending federal law. In addition, the court concluded that, in its view, petitioners have a plain, adequate and complete state remedy and, therefore, petitioners are not entitled to invoke their federal remedy in state court without first exhausting administrative remedies. Thus, the court affirmed the tax court's dismissal of petitioners' action. On June 20, 1991, the court, without opinion, denied petitioners' timely petition for reconsideration. App. B at 28a.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Oregon presents a question of far-reaching importance: whether, where a state's courts entertain actions under 42 U.S.C. § 1983, the state may impose an administrative exhaustion requirement on a § 1983 cause of action which involves an issue of state taxation?[2] This is a recurring question as to which the courts of several states are sharply divided, and therefore, warrants this Court's review. The Oregon Supreme Court's conclusion that § 1983 causes of action involving tax issues are not judicially enforceable in the first instance conflicts not only with the decisions of other state courts but also with decisions of this Court. Several of this Court's decisions involving the assertion of § 1983 claims in state court are based on the settled principles that such causes of action are judicially enforceable in the first instance and that Congress did *not* assign to state courts a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action. Moreover, the decision of the Oregon Supreme Court in this case conflicts with the landmark rule of *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

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[2] This case does *not* involve the issue of whether a state is a person for purposes of § 1983, resolved in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

The importance of the issue presented by this case was underscored by Justice Kennedy last term when he observed:

> Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers.

Dennis v. Higgins, —— U.S. ——, 111 S. Ct. 865, 880 (1991) (Kennedy, J., dissenting).[3]

Petitioners respectfully submit that this case is an appropriate case in which to resolve these important questions.

I. THERE IS A CONFLICT AMONG THE STATES.

In reaching its conclusion that Oregon may limit the right of petitioners to vindicate their rights under 42 U.S.C. § 1983, in a case involving state taxes, the Supreme Court of Oregon implicitly acknowledged that there is a split of authority on the question.[4] Its result is the same as that reached in *Hogan v. Musolf*, —— Wis. 2d. ——, 471 N.W.2d 216, *petition for cert. filed*, September 5, 1991; *L.L. Bean, Inc. v. Bracey*, 1991 WL 172407 (Tenn. 1991); *Linderkamp v. Bismarck School Dist.*, 397 N.W.2d 76 (N.D. 1986); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. Banc 1985); *Johnston v. Gaston County*, 329 S.E.2d 392 (1985); *Zizka v. Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985) and *Raschke v. Blancher*, 491 N.E.2d 1171, 141 Ill. App. 3d 813 (1968).[5]

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[3] *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987). *See also Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2444 n.20 (1990). ("Virtually every State has expressly or by implication opened its courts to § 1983 actions and there are no state court systems that refuse to hear § 1983 cases.")

[4] "There is no binding case law on point." App. A at 12a.

[5] *See also Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976); *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386 (1984), *affirmed by an equally divided Court*, 471 U.S. 82 (1985).

Numerous other state courts have held that § 1983 actions involving state tax matters may be brought in state court like any other § 1983 action. *See, e.g., American Trucking Ass'ns v. Secretary of State*, —— A.2d ——, 1991 Me. LEXIS 148 (Me. 1991); *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 864 (Miss. 1988); *Marx v. Truck Renting & Leasing Ass'n*, 520 So. 2d 1333 (Miss. 1987); *Allison v. Board of County Comm'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402, 403 (Ark. 1987); *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. denied*, 466 U.S. 951 (1984); *Bang's Bar & Grille, Inc. v. Township Council of Florence*, 206 N.J. Super. 432, 502 A.2d 1198 (1985); *Porter v. Treasurer & Collector of Taxes*, 385 Mass. 335, 431 N.E.2d 934 (1982).[6] In addition, at least four federal circuits have declined jurisdiction in state tax matters based in part upon the availability of a state-court § 1983 action.[7] Furthermore, two recent

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[6] *See also Kollasch v. Adamany*, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1980), *rev'd on other grounds*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981); *Eclectic v. Mays*, 547 So. 2d 96 (Ala. 1989); *Satellink of Chicago, Inc. v. Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 411 N.W.2d 722 (1986); *423 South Salina Street, Inc. v. Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied*, 481 U.S. 1008 (1987); *Holden Arboretum v. Kirtland*, 19 Ohio App. 3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash. 2d 96, 690 P.2d 1144 (1984) (en banc).

[7] *See Burris v. Little Rock*, —— F.2d ——, 1991 U.S. App. LEXIS 18777 (8th Cir. 1991) (§ 1983 suits may be brought in the Arkansas courts); *Long Island Lighting Co. v. Brookhaven*, 889 F.2d 428, 432 (2d Cir. 1989) ("the availability of a state-court § 1983 action strongly supports the withholding of federal jurisdiction"); *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986) ("[S]ection 1983 claims may be brought in the [Oklahoma] state court system."); *Miller v. Los Angeles*, 755 F.2d 1390, 1391 (9th Cir.), *cert. denied*, 474 U.S. 995 (1985) ("California's state courts allow actions to vindicate federal rights under section 1983.");

cases in this Court demonstrate the amenability of state courts to entertaining § 1983 causes of action involving state tax matters. *See Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865 (1991); *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, —— U.S. ——, 111 S. Ct. 2882 (1991).

The sharp divergence of state courts on this issue is further illustrated by the conflicting decisions in *Davis*-related litigation. Thousands of federal retirees seeking to enforce their rights under 4 U.S.C. § 111 have been denied the right to a judicial determination in the first instance, not only in this case, but also by the decision of the Wisconsin Supreme Court in *Hogan*, *supra*.[8] In contrast, federal retirees in Arkansas have obtained declaratory and injunctive relief under § 1983 and have established their right to seek fees under 42 U.S.C. § 1988. *See Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286, *petition for cert. filed*, No. 91-375 (1991).

II. THE DECISION OF THE OREGON SUPREME COURT IS CONTRARY TO SEVERAL DECISIONS OF THIS COURT.

A. Congress Has Preempted State Law Exhaustion Requirements in Actions Brought Pursuant to Section 1983.

The ruling of the Oregon Supreme Court and other courts that states may condition or limit a cause of action created by Congress is in direct conflict with numerous decisions of this Court. The decision has far-reaching consequences since it holds that States are free to nullify

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Comenout v. State of Washington, 722 F.2d 574, 578 (9th Cir. 1983) ("[S]ection 1983 claims may be brought in Washington state courts").

[8] In addition, the Attorney General of Arizona has noticed this issue in a cross-appeal in the *Davis*-related case of *Bohn v. Waddell*, 164 Ariz. 71, 790 P.2d 772 (Ariz. Tax Ct. 1990), *appeal docketed*, No. 1 CA-TX 90-029 (1991).

for their own people the legislative decisions that Congress has made on behalf of all the People.[9] The decision violates the principle that a State cannot immunize an official from liability for injuries compensable under federal law. *Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430 (1990); *Martinez v. California*, 444 U.S. 277 (1980). In addition, the court's decision qualifies the availability of the Congressional remedy in the first instance by holding that the "administrative process . . . must be followed before a plaintiff has standing to invoke the jurisdiction of the Oregon trial court."[10] App. A at 17a. Such a rule is plainly inconsistent with § 1983 and numerous decisions of this Court construing the § 1983 remedy.

As this Court has recognized, § 1983 "provide[s] a remedy, to be broadly construed, against *all* forms of official violation of federally protected rights." *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 869 (1991), (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-01 (1978) (emphasis added)). Section 1983 overrides any state law which conflicts with the remedies available under it and provides a federal remedy where the state remedy, though adequate in theory, is not available in practice. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961). Moreover, "it is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.[11]

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[9] "What it does mean, we believe, is that a state *may* impose such a requirement *without offending* federal law." App. A at 15a. (emphasis in the original).

[10] Indeed, the decision further suggests that in Oregon, a § 1983 cause of action does not ripen until the state remedy has been denied. App. A at 21a.

[11] As this Court has explained:

> These causes of action exist independent of any other legal or administrative relief that may be available as a matter of fed-

The decisions of this Court have repeatedly emphasized that " 'the central objective of the . . . civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. . . . Thus § 1983 provides 'a *uniquely* federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation,' . . . and is to be accorded 'a sweep as broad as its language.' " *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citations omitted; emphasis added).

The decision below conditions, if not bars, the petitioners from asserting their federal rights unless a state remedy is first invoked.[12] However, "states . . . may no more condition the federal right to recover for violations of civil rights than bar that right altogether . . .". *Felder*, 487 U.S. at 144.[13] Contrary to the decision be-

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eral or state law. *They are judicially enforceable in the first instance.* The statutes are characterized by broadly inclusive language. *They do not limit who may bring suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief.*

Burnett v. Grattan, 468 U.S. 42, 50 (1984) (emphasis added). *See Felder v. Casey*, 487 U.S. 131, 148 (1988).

[12] Such a rule ignores the dominant characteristic of civil rights actions: "they belong in court." *Burnett*, 468 U.S. at 50.

[13] *Felder*, 487 U.S. at 148, prohibits less burdensome exhaustion requirements than those imposed here. The remedy to which the petitioners have been relegated by the court below requires that they submit their claims to the defendant as a condition of recovery. ORS § 305.275(4) and (5). App. F at 41a-42a. The administrative remedy involves a burdensome multi-stage process with short statutes of limitations at each stage. For example, a person desiring a conference to contest a notice of deficiency or an adjustment of a refund claim must do so within 30 days. ORS §§ 305.265(5) and 305.270(3) and (4). App. F at 40a-41a. The conference is to be held within one year of the date of the notice. ORS § 305.265 (5). App. F at 40a-41a. However, the failure of the Department to hold the conference within the specified period does not invalidate the Department action which is being challenged. Thereafter,

low, Congress has not assigned to either the Oregon Supreme Court or legislature "a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Yet, its decision rests solely on considerations of local policy. App. A at 17a. As this Court has recently observed:

> 'The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist.'

Howlett v. Rose, —— U.S. ——, 110 S. Ct. 2430, 2440 (1990) (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)).

The effect of the decision below is to bestow a form of absolute immunity upon state officials in the guise of jurisdiction.[14] However, this Court has recently rejected the argument that a state legislature, by enacting administrative exhaustion statutes, can deprive a state court of jurisdiction:

> The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.' Indeed, if this argument had merit,

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an appeal of an adverse determination must be made by the taxpayer within 90 days or it becomes final. ORS § 305.280(2). App. F at 42a. The director of the Department of Revenue must make the final determination on all appeals. ORS § 305.115(1). App. F at 40a. Thereafter, the taxpayer has 60 days to commence an action in the tax court or the director's decision is final. ORS § 305.560(1). App. F at 43a.

[14] Defendant Munn controls the administrative process. See ORS §§ 305.046(1) and 305.115(1), App. F at 40a. Thus, it is possible for the defendants to manipulate the completion of the exhaustion process in order to assert that a subsequent § 1983 action is time barred. *See Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Patsy v. Board of Regents*, 457 U.S. 496, 514 n.17 (1982). *Cf. University of Tennessee v. Elliot*, 478 U.S. 788 (1986) (unappealed fact finding of agency entitled to preclusive effect).

> the State of Wisconsin could overrule our decision in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), by simply amending its notice of claims statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice. The Supremacy Clause requires more than that.

Howlett v. Rose, —— U.S. ——, 110 S. Ct. 2430, 2446 (1990).[15]

B. The Tax Injunction Act and Federal Principles of Comity Are Inapplicable to § 1983 Claims Brought in State Court.

Equally unavailing is the Oregon Supreme Court's suggestion that the result in this case is supported by the Tax Injunction Act and this Court's decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981).[16] As Justice Scalia recently observed, " 'jurisdiction is not defeated by implication.' " *Tafflin v. Levitt*, 493 U.S. 455, 110 S. Ct. 792, 801 (1990) (Scalia, J., concurring) (citations omitted). "It . . . takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction. . . ." *Id.* The language of the Tax Injunction Act plainly declares the legislative pur-

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[15] It is indisputable that the tax court in this case had general jurisdiction of the class of actions to which this case belongs. *See* ORS §§ 305.405 and 305.410, App. F, at 42a-43a. *See also, Portland Adventist Medical Center v. Sheffield*, 303 Or. 197, 735 P.2d 371 (1987). Indeed, it is anomalous that the court below justified its ruling to deny state judicial relief for a continuing violation of a federal right by resort to principles of federal comity while acknowledging that the same court had jurisdiction in *Portland Adventist Medical Center* to resolve a purely state question. App. A at 19a. Such a result is impermissible. *Howlett*, 110 S. Ct. at 2440.

[16] 28 U.S.C. § 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

pose.[17] By its express terms, the Act applies only to the federal courts and has no application to a state court.[18]

The result reached by the Oregon Supreme Court depends upon the addition of words to both the statutory provisions of § 1983 and 28 U.S.C. § 1341 which are complete as they stand. Acceptance of the court's view below "would require amendment rather than construction of the statute[s], and it must be rejected here." *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987). Only Congress has the authority to place exhaustion requirements on § 1983 actions brought in state court. Congress has never even intimated that an exhaustion requirement should be imposed upon a § 1983 claimant who challenges a state taxing scheme in a state court. The Oregon Supreme Court has impermissibly invaded Congress' legislative province by judicially extending federal court jurisdictional limitations onto state court § 1983 actions. "It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 923 (1984). "[T]he states are [not] free to redefine the federal cause of action." *Howlett*, 110 S. Ct. at 2446.

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[17] As this Court has explained, "'[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statue itself 'must ordinarily be regarded as conclusive.'" *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (citations omitted).

[18] The legislative history of the Tax Injunction Act clearly establishes that Congress only intended to limit *federal* court jurisdiction over state tax challenges. Indeed, one of the principal reasons Congress passed the Act was to establish state courts as the primary forum for lawsuits challenging state taxes. *See* 81 Cong. Rec. 1417 (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Congress, 1st Sess. 2 (1937). The legislative reports to the Act also make clear that "the bill does not take away any equitable right of the taxpayer or deprive him of his day in court." *Id.*

The court below also reasoned that its recognition of an exhaustion requirement was supported by this Court's decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). However, *McNary* held that the principle of comity only prevents a § 1983 action "against the validity of state tax systems in *federal court*." *McNary*, 454 U.S. at 116 (emphasis added). *McNary* merely precludes actions seeking damages under § 1983 from being brought in federal court where the state remedy is considered to be adequate.[19]

Nowhere in the *McNary* decision is it stated or implied that a taxpayer who brings a § 1983 claim in state court is to be treated differently than other § 1983 plaintiffs. *McNary's* holding was expressly limited to § 1983 actions brought in federal court. *Id.* at 116. In fact, the Court stated that taxpayers seeking to vindicate rights under § 1983 "must seek protection of their federal rights by state remedies. . . ." *Id.* (emphasis added). In addressing the remedies available in Missouri to the § 1983 plaintiffs, the Court stated that "the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court." *Id.* Moreover, subsequent to *McNary*, the Court in *Pennhurst State Schools & Hosp. v. Halderman*, 465 U.S. 89 (1984), stated: "[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . *must be brought in state court*." *Id.* at 122 (emphasis added).[20]

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[19] In *McNary*, the adequancy of the available Missouri remedies was not in issue. *Id.* at 116.

[20] In the wake of *McNary*, numerous state courts have held that § 1983 actions involving state taxes may be brought directly in state court. *See, e.g., Burell v. Mississippi State Tax Comm'n*, 536 So. 2d 848 (Miss. 1988) (expressly overruling, based on *McNary*, a Mississippi Supreme Court Case, *State Tax Comm'n v. Fondren*, 387 So. 2d 712, 723 (Miss. 1980), which held that a section 1983 action seeking to enjoin the State from collecting an unconstitutional tax could not be brought in state court); *Allison*

In *McNary*, this Court did not decide the issue whether comity would bar federal court jurisdiction of a § 1983 claim which requires no scrutiny of state tax assessment practices. The Court stated:

> We need not decide in this case whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race.

McNary, 454 U.S. at 107 n.4. Yet, the Oregon Supreme Court held that *McNary* stands as authority to bar this state court § 1983 claim which requires no scrutiny of state tax assessment practices. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2442 (1990). Oregon is not "free to redefine the federal cause of action." *Id.* at 2446.

This case involves a facial attack on the taxing scheme. App. A at 4a. The federal constitutional defense raised by the defendants in this case does not turn on questions of state law. The issue of continued enforcement of the scheme turns exclusively on an "unambiguous" 1939 enactment of Congress, which was construed by this Court in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). The defendants have fully considered the issue and have asserted that the rule in *Davis* is not applicable retroactively. TR. 104, 142.[21] That position remains unchanged despite the fact that the issue resolved in *Davis* was whether Mr. Davis' federal pension was legally tax-

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v. Board of County Comm'rs, 241 Kan. 266, 737 P.2d 6 (1987) (holding, pursuant to *McNary*, that a § 1983 claim challenging a state's unequal assessment must be brought in state court); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402, 403 (Ark. 1987).

[21] Alternatively, the defendants asserted that "*Davis* was wrongly decided." TR. 269.

able under the Michigan Income Tax Law for years 1979 through 1984. *Davis*, 489 U.S. at 806-07, 817.[22]

Even if the rule of comity governing litigation in federal courts could otherwise be extended to a state court, it has no application here. The "rule seeks to avoid withholding tax funds from local authorities until the tax is determined to be unlawful, *not afterwards*." *McNary*, 454 U.S. at 123 n.8 (Brennan, J., concurring) (emphasis added). Here there is no effort to escape payment of other income taxes. Petitioners seek relief from the continuing enforcement of only those taxes which have already been determined to be unlawful. Therefore, no part of the tax will have been "lost to the States without a judicial examination into the real merits of the controversy." S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). The conclusion of the court below that federal notions of comity justify exhaustion in this state court § 1983 case is without merit. The exactions and continuing wrongs sought to be enjoined are merely in the "guise of a tax" and are unenforceable even if federal comity principles are applied. *See Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *American Trucking Ass'n v. Gray*, 483 U.S. 1306 (1987) (in chambers).

C. The Decisions of This Court Excuse the Exhaustion of Inadequate or Futile Administrative Remedies.

Even if an exhaustion requirement could otherwise be imposed, exhaustion of administrative remedies is not

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[22] Petitioners represent that the defendants' position remains unchanged even after the judgment of this Court in *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S. Ct. 2439, 2445-46 (1991) ("Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided. . . . *Cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817.") (footnote and citations omitted).

warranted in this case.[23] A party need not exhaust administrative remedies that are inadequate or where exhaustion would be futile. *See, e.g., Coit Independence Joint Venture v. Federal Savings & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989); *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Bowen v. New York*, 476 U.S. 467, 485 (1986); *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 27 (1934); *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499, 505 (1928).[24]

In this case, "the recovery of damages under the Civil Rights Act first requires a 'declaration' or determination of the unconstitutionality of a statutory scheme. . . ." *McNary*, 454 U.S. at 115. Yet, the administrative agency possessed no such power at the time this action was commenced or at the time the motions were considered.[25]

There also is no statutory authority which confers subject matter jurisdiction upon the Department of Revenue

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[23] The "basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). None of those objectives would be served by petitioners' resort to administrative remedies in this case.

[24] At least until the decision below, Oregon law was in accord. *See eg., Hodges & Wilson v. Silver Hill Mining Co.*, 9 Or. 200, 204 (1881) ("[T]he law will not attempt to do an act which is vain, or to enforce an act which would be fruitless"); *Marbet v. Portland Gen. Elec.*, 277 Or. 447, 456, 561 P.2d 154 (1977) (The exhaustion requirement is "less obviously applicable when the agency action is challenged as based on an unconstitutional statute" since this is a "legal [flaw] which the agency could not remedy in the contested case.").

[25] This action was commenced on June 19, 1989. Interim relief was sought immediately and permanent declaratory relief was sought on September 6, 1989. However, the statutory amendment referred to by the court below was first effective on and after October 3, 1989. App. A at 19a. *See* Or. Laws 1989, Ch. 414 § 2. App. F at 40a.

to entertain a civil rights action brought pursuant to § 1983. The Petitioners seek damages against the defendants in their *individual* capacities. TR. 194. The Oregon Statutes do not confer jurisdiction upon the Department of Revenue to enter judgment against the defendants and hold each *individually* liable.[26] Thus, it is simply inconceivable how the petitioners could exhaust their § 1983 claims before an agency that lacks jurisdiction to hear them.

The administrative remedy which the court below ruled that the Petitioners must exhaust is a *burdensome*, but empty ritual. The resolution of the issue of whether the defendants can prospectively apply 4 U.S.C. § 111 only to pensions received in years 1990 and after does "not require any particular expertise on the part" of the Oregon administrative agency. *See McKart v. United States*, 395 U.S. 185, 198 (1969). The defense asserted by the defendants raises solely a federal question. This "antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise." *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S. Ct. 2439, 2443 (1991). "[J]udicial review would not be significantly aided by an additional administrative decision." *McKart*, 395 U.S. at 199. The issue has already been resolved by this Court in *Davis*.

In addition, the petitioners have been repeatedly advised that their "claim[s] of nontaxability . . . [are] denied." *See City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 27 (1934). TR. 222. As the Court observed in *Schnader*:

> [T]he Secretary of Revenue has refused to issue a waiver of tax, and . . . the Attorney General has notified the appellant and the State's appraiser the

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[26] "It is true, as Defendants concede, that the Department cannot award taxpayers damages under 42 U.S.C. § 1983." App. A at 20a-21a.

> property is subject to tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity.

Id. at 34. Any resort to the agency would have been "utterly futile." *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499, 505 (1928). Thus, exhaustion is excused.[27]

D. The Oregon Supreme Court's Decision Requiring Exhaustion Conflicts With This Court's Decisions Under the Due Process Clause.

1. § *1983 Claims.*

The Due Process Clause of the Fourteenth Amendment requires that a judicial tribunal be impartial. In *Withrow v. Larkin*, 421 U.S. 35 (1975), this Court stated that "a biased decisionmaker [is] constitutionally unacceptable." *Withrow*, 421 U.S. at 47. "This applies to administrative agencies which adjudicate as well as to the courts." *Id.* at 46, *citing Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). This Court stated further that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or

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[27] These officials have had the chance to correct the violations and have refused to do so. The gravamen of the petitioners' action, *inter alia*, is that the defendants have implemented an unlawful scheme to mislead petitioners and the members of the class whom the petitioners seek to represent for the purpose of extinguishing as many claims as possible. As this Court has observed:

> We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.

Bowen v. New York, 476 U.S. 467, 484 (1986).

decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. The Court noted that among these cases are those in which the "adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal . . . criticism from the party before him." *Id.*

In the instant action, defendant Munn has been sued in his individual capacity.[28] Therefore, defendant Munn has a direct pecuniary interest in this lawsuit. Moreover, this litigation has been aggressively pursued by the petitioners and vigorously defended by the defendants. Under these facts, the petitioners cannot possibly receive an unbiased adjudication of their rights.

2. *State Refund Remedy.*

The petitioners in the proceedings below also challenged, *inter alia*, the adequacy of the state law refund remedy. *See* App. G, *infra*, at 46a. The court below concluded that "it does not appear to us that the Tax Court erred" in applying the doctrine of exhaustion of administrative remedies to the petitioners' other claims. App. A., *infra*, at 24a.[29] The decision of the court below conflicts with this Court's decisions under the Due Process Clause of the Fourteenth Amendment.

The petitioners have been denied predeprivation relief under state law and have been relegated to a state law remedy for post-payment relief.[30] TR. 147. This Court

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[28] Defendant Munn is the current Director of the Department of Revenue. He controls and directs each stage of the administrative remedy within the Department of Revenue.

[29] The opinion below, however, erroneously suggests that the petitioners did not challenge on appeal the tax court's ruling with respect to the petitioner's pendent state law claims. *See* App. A., *infra*, at 24a.

[30] It is settled that a tax is paid under duress where a state has not provided a fair and meaningful predeprivation procedure when a "tax is paid in order to avoid financial sanctions or a seizure of

has consistently ruled that "the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson v. Division of Alcoholic Beverages & Tobacco*, —— U.S. ——, 110 S. Ct. 238, 2250 (1990). *McKesson* also holds that in a refund action "the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' . . . to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 2251 (citations omitted).

The actions of the respondents at issue in this case necessarily involve a claim by defendant Munn and others that they have no duty to comply either with the mandate of 4 U.S.C. § 111 or this Court's considered decision in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989).[31] Yet, the decision below, premised solely on parochial policy considerations, requires that the petitioners bear the expense and delay of a futile administrative ritual before being permitted a judicial remedy to recover a tax that the State was without power to impose in the first instance.[32]

The decisions of this Court establish that the fundamental requirement of due process "is the opportunity

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real or personal property." *See McKesson v. Division of Alcoholic Beverages & Tobacco*, —— U.S. ——, 110 S. Ct. 2238, 2251 n.21 (1990). The respondents routinely enforce a panoply of civil and criminal penalties for a failure to report and/or comply with the respondents' interpretation of the Oregon personal income tax law. *See, e.g.*, ORS §§ 305.990, 305.992, 314.400, 314.525 and 316.992. App. F, *infra*, at 43a-45a.

[31] *See* Section II, B and C, *supra*.

[32] The exhaustion requirement of ORS § 305.275(4) is not jurisdictional. *See Ebert v. State, Dept. of Revenue*, 302 Or. 360, 730 P.2d 550 (1986). Moreover, the petitioners properly pleaded futility. This allegation was not controverted by the respondents in the trial court. *See* App. H, *infra*, at 47a.

to be heard 'at a meaningful time and in a meaningful manner'." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). However, the Oregon Supreme Court's decision requires that petitioners go before a decisionmaker who has a personal stake in the outcome and who has already decided the case against the petitioners. An exhaustion requirement such as that imposed by the court below violates the Due Process Clause. *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

E. The Oregon Supreme Court's Decision is in Conflict with the Court's Decision in *Ex parte Young*.

With respect to Petitioners' claims for injunctive relief, the defendants have made clear that they will continue to assess, enforce and penalize those who fail to comply with this unlawful scheme.[33] TR. 142. In the process, they put these elderly citizens at risk that their constitutional rights will be extinguished. The exhaustion requirement ordered by the court clothes the defendants with a form of immunity from suit. However, as the decisions of this Court establish, the court below had no power to impart such immunity.

In *Ex parte Young*, 209 U.S. 123 (1908), the Court rejected the defense of sovereign immunity and issued an injunction, stating:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. *The State has no power to impart to him any im-*

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[33] Petitioners Perkins and Simpson have received such post-*Davis* notices of enforcement, relief from which, *inter alia*, was sought below. TR 222.

> *munity from responsibility to the supreme authority of the United States.*

Id. at 159-60 (emphasis added).[34]

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), this Court reaffirmed petitioners' entitlement to pursue their § 1983 claim for injunctive relief:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'

Id. at 71 n.10.[35]

The Oregon Supreme Court was powerless to change rights established by Congress. As this Court has ruled:

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.

Claflin v. Houseman, 93 U.S. 130, 136 (1876).

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[34] *See Osborn v. Bank of the United States*, 22 U.S. 738, 859 (1824) ("If the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof . . . [it can] furnish no authority to those who took, or those who received, the [taxes] for which this suit was instituted."); *Georgia R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-05 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state. . . . This general rule has been applied in suits against individuals threatening to enforce allegedly unconstitutional taxation. . . ."). (footnotes omitted).

[35] Indeed, even in the absence of a § 1983 complaint, Oregon courts have consistently applied the rule of *Ex parte Young*. *See Hanson v. Mosser*, 247 Or. 1, 17, 427 P.2d 97 (1967), *overruled on other grounds, Smith v. Cooper*, 256 Or. 485, 475 P.2d 78 (1970); *Gast v. State*, 36 Or. App. 441, 447, 585 P.2d 12 (1978).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of Oregon should be granted.

Respectfully submitted,

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September 16, 1991

APPENDICES

APPENDIX A

Filed: May 9, 1991

IN THE SUPREME COURT
OF THE STATE OF OREGON

(TC 2867; SC S36652)

EDWIN S. and AGNES D. NUTBROWN, husband and wife; DONALD R. and THERESA PAAPE, husband and wife; HOWARD R. and MARGARET E. CLEARY, husband and wife; NORMAN L. and GLORIA MINKS' SUCCESSOR-IN-INTEREST, husband and wife; JAMES M. and MARGARET JACKSON, husband and wife; ELENOR JEAN and FELIX ERRO, husband and wife; JAMES F. SIMPSON and TERRI D. DILL-SIMPSON, husband and wife; LOUIS Z. and LORNA K. PERKINS, husband and wife; on behalf of themselves and all present and former residents of Oregon who were paid retirement benefits by the United States Government and were or are subject to Oregon state income taxation thereon in any year during the period 1979 forward; and all others similarly situated,

Appellants,

v.

RICHARD A. MUNN, individually and as Director of the Department of Revenue of the State of Oregon; ROBYN GODWIN, individually and as prior Director of the Department of Revenue of the State of Oregon; JOHN J. LOBDELL, individually and as prior Director of the Department of Revenue of the State of Oregon; all the unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former Directors of the Department of Revenue of the State of Oregon, or at the direction of the current and former Directors of the Department of Revenue of the State of Oregon and the DEPARTMENT OF REVENUE, State of Oregon,

Respondents.

Appeal from Oregon Tax Court
Carl N. Byers, Judge

Argued and submitted May 2, 1990

Eugene O. Duffy, Milwaukee, Wisconsin, argued the cause for appellants. With him on the briefs were Gary I. Grenley and Michael C. Zusman of Grenley, Rotenberg, Laskowkie, Evans & Bragg, P.C., Portland, O'Neil, Cannon & Hollman, S.C., Milwaukee, Wisconsin, and John B. Gould, Portland.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause on behalf of the respondents. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Peterson, Chief Justice, and Carson, Gillette, Van Hoomissen, Fadeley, and Unis, Justices.

GILLETTE, J.

The judgment of the Oregon Tax Court dismissing Taxpayers' complaint is affirmed.

GILLETTE, J.

In this original proceeding brought in the Oregon Tax Court, plaintiff taxpayers ("Taxpayers") sought declaratory and injunctive relief and damages against present and former state officers and the Department of Revenue ("Defendants") pursuant to the federal Civil Rights Act, 42 USC § 1983.[1] Taxpayers also alleged claims for re-

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[1] 42 USC § 1983 provides, in part:

"Every person who, under color of any [state law] * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depriva-

fund, claims in quasi-contract, claims in constructive trust, and claims for an order setting aside certain tax payments already made. The complaint was dismissed on Defendants' motion pursuant to Tax Court Rule (TCR) 21, based on Taxpayers' failure to exhaust their administrative remedies. Taxpayers appeal, seeking reinstatement of their federal civil rights claim. We affirm the judgment of dismissal.

THE PARTIES

Taxpayers are eight married couples who have filed joint Oregon tax returns. One member of each of the couples receives retirement benefits paid by one or another agency of the United States. The State of Oregon imposes an income tax on those benefits, although it does not tax analogous benefis paid to persons who have retired, under the Public Employees Retirement System, from service in Oregon government. Taxpayers purport to bring this action not only for themselves, but for all others similarly situated. Defendants are the current Director of the Oregon Department of Revenue, his two immediate predecessors in that position, other persons allegedly acting in "concert or cooperation" with the current and former directors, and the Oregon Department of Revenue.

PROCEDURAL HISTORY

This case is a successor to a substantially similar action brought in the Multnomah County Circuit Court on May 18, 1989, by many of the same taxpayers who are parties plaintiff here, against these same Defendants. Defendants in that case moved for dismissal pursuant to ORCP 21 on various grounds, including lack of subject matter jurisdiction, statutes of limitations, and sovereign

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tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

immunity. Defendants specifically urged dismissal on the additional ground that the subject matter of the action arose under the tax laws of the State of Oregon and, therefore, exclusive jurisdiction over the action was vested in the Oregon Tax Court. The circuit court dismissed the case. So far as we are aware, no appeal was taken from that dismissal. Taxpayers then initiated the present proceeding in the Oregon Tax Court.

After Taxpayers had filed their first amended complaint in the Oregon Tax Court, Defendants moved to dismiss the complaint pursuant to TCR 21 on the ground, *inter alia*, that the Taxpayers lacked standing because they had not exhausted their administrative remedies in the Department of Revenue before invoking the Tax Court's jurisdiction.[2] The Tax Court granted Defendants' motion to dismiss on the ground that Taxpayers had failed to exhaust their administrative remedies. The present appeal followed.

OREGON SYSTEM FOR TAXING GOVERNMENT RETIREMENT BENEFITS

Taxpayers allege, and Defendants acknowledge, that Oregon taxes income from government retirement benefits for former Oregon state workers differently than it taxes income from government retirement benefits of former federal workers. The taxation of income from federal retirement programs is governed by ORS 316.680(1)(c), which provides for deduction of certain of that income from the figure for "federal taxable income" on a taxpayer's Oregon income tax return:

> "(1) There shall be subtracted from federal taxable income:
>
> "* * * * *

[2] Defendants asserted additional grounds for dismissal that are not pertinent to this appeal.

> "(c) Amounts received by a retiree, or the surviving spouse of a retiree in the taxable year in compensation for or on account of personal services rendered in prior years, from a pension, annuity, retirement or similar fund under a public retirement system established by the United States, including the retirement system for the performance of service in the Armed Forces of the United States, or by this state or any municipal corporation or political subdivision of this state. The maximum amount excludable from taxable income under this paragraph from such pensions or annuities shall be in the amount of $5,000. If the taxpayer receives $30,000 or more of household income, as defined in ORS 310.630, the subtraction shall be reduced one dollar for each one dollar, or fraction thereof, that the household income of the taxpayer exceeds $30,000."

Thus, the largest amount of federal retirement income a retired federal worker may deduct is $5,000, and the worker may not deduct any of the worker's retirement income if the total of the retired worker's "household income" exceeds $35,000. The retired federal worker must pay Oregon income tax on any amount not deducted.

Oregon public employee retirees are treated differently. The Oregon Public Employees' Retirement System was established by the Public Employee's Retirement Act of 1953, Or Laws 1953, ch 200, and is now codified as ORS 237.001 to 237.315. A part of that Act, ORS 237.201 (1), provides:

> "The right of a person to a pension, an annuity or a retirement allowance, to the return of contribution, the pension, annuity or retirement allowance itself, any optional benefit or death benefit, or any other right accrued or accruing to any person under the provisions of ORS 237.001 to 237.315, and the money in the various funds created by ORS 237.271 and 237.281, shall be exempt from garnishment and

> all state, county and municipal taxes heretofore or hereafter imposed, except as provided under ORS chapter 118, shall not be subject to execution, garnishment, attachment or any other process or to the operation of any bankruptcy or insolvency law heretofore or hereafter existing or enacted except for execution or other process upon a support obligation or an order or notice entered pursuant to [certain other statutes not pertinent to the present case], and shall be unassignable." [3]

Taxpayers assert that this disparate treatment, for Oregon personal income tax purposes, of retirement income of state and federal workers is unconstitutional.

THE LAW OF INTERGOVERNMENTAL TAXATION

It has been unconstitutional, at least since *McCulloch v. Maryland*, 4 Wheat 316, 4 L Ed 579 (1819), for a state to tax an instrumentality of the federal government. This rule, which came to be known as the doctrine of intergovernmental tax immunity, was expanded over

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[3] In 1989, the Legislative Assembly enacted Oregon Laws 1989, chapter 906, section 2, which would have added the following subsection (2) to ORS 237.201:

> "Subsection (1) of this section does not apply to state personal income taxation of amounts paid under ORS 237.001 to 237.315."

The new provision would have applied to retirement benefits paid during the 1989 calendar year, and thereafter. Or Laws 1989, ch 906, § 10. Arguably, its enactment would have mooted Taxpayers' complaint, at least to the extent that Taxpayers seek prospective relief, by providing equal treatment for federal and state retirement income. However, opponents of the amendment were able to obtain sufficient signatures to have the amendment referred to the people as Ballot Measure 3 at the November 1990 general election. The measure was defeated, with the result that the 1989 legislative amendment failed to become law. Thus, the disparate treatment about which Taxpayers complain continues.

time to the point that it was presumed impermissible either for a state to tax the salary of a federal officer or for the federal government to tax the salary of a state official. *See, e.g., The Collector v. Day*, 78 US 113, 124-28, 20 L Ed 122 (1871) (invalidating federal taxation of state judge's salary); *Dobbins v. Erie County*, 41 US 435, 10 L Ed 1022 (1842) (invalidating state tax on federal officer). These cases later were substantially limited. *See Helvering v. Gerhardt*, 304 US 405, 58 S Ct 969, 82 L Ed 1427 (1938) (nondiscriminatory taxation of state employees' income permissible); *Graves v. N.Y. ex rel. O'Keefe*, 306 US 466, 486-87, 59 S Ct 595, 83 L Ed 927 (1939) (nondiscriminatory state taxation of federal employees permissible). However, the requirement that any such intergovernmental tax be nondiscriminatory survives. Moreover, and at roughly the same time as the *Gerhardt* and *O'Keefe* cases were being decided, Congress enacted 4 USC § 111, which provides:

> "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

Thereafter, the State of Michigan created an income taxing system that substantially resembled the Oregon income tax system involved in this case. Certain Michigan residents who were federal retirees receiving federal pensions challenged the Michigan system as offending both the intergovernmental tax immunity doctrine and 4 USC § 111. The case eventually reached the Supreme Court of the United States. *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989). The Court held that 4 USC § 111 embodied the same concept as the intergovernmental tax immunity doctrine, and that both prohibited the State of Michigan from tax-

ing the retirement benefits of former federal employees while exempting from taxation retirement benefits paid by the state and its political subdivisions. *Id.* at 817. Armed with *Davis*, Taxpayers here assert that Defendants refuse to follow *Davis* with respect to the Oregon income taxing system and that such refusal violates their rights under the United States Constitution and laws and is, therefore, actionable under 42 USC § 1983. The Oregon Tax Court, they contend, should have reached the merits of their case and so declared.

OREGON TAX COURT JURISDICTION

The Oregon Tax Court was created in 1961. *See generally Sanok v. Grimes*, 294 Or 684, 690-97, 662 P2d 693 (1983); *Jarvill v. City of Eugene*, 289 Or 157, 163-66, 613 P2d 1, *cert den* 449 US 1013 (1980) (describing creation and jurisdiction of Oregon Tax Court). Two statutes, ORS 305.405 and 305.410, establish the basic jurisdiction of the Oregon Tax Court. ORS 305.405 provides:

> "As part of the judicial branch of state government, there is created a court of justice to be known as the Oregon Tax Court. The tax court, in cases within its jurisdiction pursuant to ORS 305.410:
>
> "(1) Is a court of record and of general jurisdiction, not limited, special or inferior jurisdiction.
>
> "(2) Has the same powers as a circuit court.
>
> "(3) Has and may exercise all ordinary and extraordinary legal, equitable and provisional remedies available in the circuit courts, as well as such additional remedies as may be assigned to it."

ORS 305.410 provides:

> "(1) Subject only to the provisions of ORS 305.445 relating to judicial review by the Supreme Court and to subsection (2) of this section, the tax court shall

be the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state. * * *

"* * * * *

"(3) Except as permitted under section 2, amended Article VII, Oregon Constitution, this section and ORS 305.445, no person shall contest, in any action, suit or proceeding in the circuit court or any other court, any matter within the jurisdiction of the tax court."

As a general rule, cases reach the Oregon Tax Court on appeal from decisions of the Department of Revenue. This is because the statutory route for appeals of the actions of tax assessment and collection officers, both state and local, is through the Department. ORS 305.275(1), (2) and (4).[4] Taxpayers' allegations in this case concern

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[4] ORS 305.275(1), (2), and (3) provide:

"(1) Any person aggrieved by an act or omission of:

"(a) The Department of Revenue in its administration of the revenue and tax laws of this state; or

"(b) A county board of equalization other than an order of the board; or

"(c) A county assessor, including but not limited to the denial of a claim for exemption, the denial of special assessment under ORS 308.370 or other special assessment statute, or the denial of a claim for cancellation of assessment; or

"(d) A tax collector,

which affects the property of the person and for which there is no other statutory right of appeal, may appeal to the Director of the Department of Revenue in the manner provided by this section.

"(2) A taxpayer or county assessor who is aggrieved by an order of a county board of equalization, may appeal from the order in the manner provided in this section.

"(3) Any person having a statutory right of appeal to the department or the director under the revenue and tax laws of the state shall appeal in the manner provided by this section."

the manner in which the Department and its officers and agents have proceeded and allegedly intend to proceed under the personal income tax laws. ORS 305.275(4) provides:

> "Except as provided in ORS 118.350 and 305.410, [neither of which exceptions are pertinent to the present case,] no person shall appeal to the Oregon Tax Court or other court on any matter arising under the revenue and tax laws administered by the [D]epartment [of Revenue] unless the person first exhausts the administrative remedies provided before the [D]epartment and the director [of the Department of Revenue]."

In other words, a taxpayer wishing to appeal to the Oregon Tax Court first must exhaust the taxpayer's administrative remedies with the Department, at least where the Department has authority to deal with the contentions of the taxpayer under the tax laws.

In summary, the Oregon Tax Court has exclusive jurisdiction over "all questions of law and fact arising under the tax laws" of Oregon. ORS 305.410. At least with respect to the jurisdiction conferred on it by law, the Tax Court has all of the powers generally associated with circuit courts. ORS 305.405. The Director of the Department is responsible for hearing appeals challenging administrative decisions of the Department taken under the tax laws. ORS 305.275(1)(a). A party wishing to take an appeal to the Tax Court must, if the matter involves a subject within the appellate jurisdiction of the Director of the Department, first prosecute an appeal to the Director before filing an appeal to the Tax Court. ORS 305.275(4).

The Oregon Tax Court dimissed the complaint in this case due to the failure of Taxpayers to comply with ORS 305.275(4). Taxpayers assert that the Tax Court

erred in doing so for three different reasons.[5] We turn now to consideration of Taxpayers' arguments.

TAXPAYERS' CONTENTIONS

i. Tax Court Authority to Proceed Without Exhaustion

Taxpayers argue, first, that requiring them to exhaust their administrative remedies pursuant to ORS 305.275 (4) is inappropriate in cases brought under 42 USC § 1983 because states may not erect procedural barriers to vindication of rights under that federal statute. We agree with this general proposition of law, but disagree that it has any applicability to the present case.

State courts have concurrent subject matter jurisdiction with federal courts over § 1983 actions. *Maine v. Thiboutot*, 448 US 1, 100 S Ct 2502, 65 L Ed 2d 555 (1980). In fact, Oregon courts are available to hear claims under § 1983. *See Rogers v. Saylor*, 306 Or 267, 280, 760 P2d 232 (1988) (suggesting, but not holding, that Oregon courts may be required to hear such claims). A state generally may not erect procedural barriers such as requiring that state remedies be sought and denied, before the federal remedy is invoked. *Rogers v. Saylor*, *supra*, 306 Or at 278 (citing *Felder v. Casey*, 487 US 131, 139, 108 S Ct 2302, 101 L Ed 2d 123 (1988)). From the foregoing, Taxpayers reason that they cannot be required to comply with ORS 305.275(4) before bringing their § 1983 action. Defendants respond that Taxpayers may be so required, because tax cases represent a special category of cases in which it is permissible for a state to require

[5] Although, as already noted, Taxpayers asserted several claims in their first amended complaint before the Oregon Tax Court, all of their arguments to us concern the dismissal of their claim under 42 USC § 1983. This may be due to the fact that all of Taxpayers' other claims involve state law theories and clearly are subject to the exhaustion requirements of ORS 305.275(4).

exhaustion of administrative remedies. There is no binding case law on point.

Defendants rely on *Fair Assessment in Real Estate Ass'n v. McNary*, 454 US 100, 102 S Ct 177, 70 L Ed 2d 271 (1981). *McNary* was a § 1983 action brought by property owners and others against certain Missouri tax assessment officials in federal district court. A majority of the Supreme Court of the United States held that "principle[s] of comity" prevented a federal court from entertaining such an action challenging the validity of state tax systems. *Id.* at 116. Four justices concurred on the ground that no issue of comity arose, because the fair import of the Tax Injunction Act, 28 USC § 1341,[6] indicated a congressional intent to limit the availability of § 1983 actions to those in which administrative remedies had been exhausted. *Id.* at 137 (Brennan, J., concurring).

In arguing to the contrary, Taxpayers rely on two cases decided since *McNary*. Neither case involved state taxation systems. In *Felder v. Casey*, 487 US 131, 108 S Ct 2302, 101 L Ed 2d 123 (1988), plaintiff sought damages in state court for alleged violations of his constitutional rights arising out of an arrest. The issue in the case was whether a Wisconsin statute that required potential plaintiffs to give notice of the circumstances giving rise to their claims, and then to refrain from bringing any action for 120 days thereafter, could bar a § 1983 action that was filed in violation of those limitations. The Supreme Court of the United States ruled that such a procedural bar could not be imposed.

The Court first held that, as a general rule, a state could not require exhaustion of state law remedies as a

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[6] 28 USC § 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

prerequisite to filing a § 1983 action in state court. *Id.* at 146-48. If there were to be exceptions to this "no exhaustion" rule in particular classes of cases brought under § 1983, the Court held, the exceptions would have to come from choices made by Congress. *Id.* at 148-49. The Court did not purport to strike down *all* procedures required by state law, but it did indicate that any procedures that had the likely or intended effect of cutting down on the availability of the § 1983 remedy would not be acceptable. The Court by way of summary stated:

> "In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. *A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability*, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, *is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.* Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court."

Id. at 153. (Emphasis supplied.)

We do not read *Felder* to state any new or surprising principle. Where a state procedural rule has the effect of "minimizing government liability," as Minnesota's notice-of-claim statutes did in *Felder*, and as the damage limitations provisions of the Oregon Tort Claims Act did in *Rogers v. Saylor*, state law is inconsistent with the federal remedy, and cannot stand. *Rogers v. Saylor*, *supra*, 306 Or at 280-85. But, as noted, *Felder* does *not* purport to strike down *all* statutory procedural rules that would apply to § 1983 actions in state court. It speaks only to those state rules that would have the effect of limiting the remedy in a way that it would not

be limited if the action were brought in federal court. Moreover, because § 1983 is a statute, it is clear that the Court was prepared to enforce any exhaustion requirement that the Congress considered appropriate.

Taxpayers also rely on *Patsy v. Florida Board of Regents*, 457 US 496, 102 S Ct 2557, 73 L Ed 2d 172 (1982), a § 1983 case brought in federal district court alleging race and sex discrimination. The defendant university system argued that the plaintiff had an adequate administrative remedy that she should have pursued. The Supreme Court of the United States rejected this argument: "Th[is] general rule [is] that federal courts cannot require exhaustion under § 1983." *Id.* at 512. The Court noted, however, that whether exhaustion of remedies was required in a given context was, first and foremost, a question of the intent of Congress:

> "[L]egislative purpose * * * is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent."

Id. at 501-02. As was true of our review of *Felder*, we see no suggestion in this case that the Court meant to depart from its earlier holding in *McNary*, or limit the viability of state laws that do not affect or limit the substance of the federal right. We see no basis for saying that exhaustion of administrative remedies will be *required*, as a matter of law, in federal courts, but may

not even be *permitted*, as a matter of sovereign choice, in state courts.

We believe that the *McNary* decision states the correct rule. Although there were different rationale to support the result, *McNary* demonstrates that the general rule found in *Felder* and *Patsy*—that § 1983 actions may be brought in the state court without exhausting state administrative remedies—does not apply to cases in which the allegedly actionable behavior of the defendants implicates the state's method of assessing and collecting taxes. Under both the majority rationale in *McNary* and under the Tax Injunction Act, if Taxpayers had brought their § 1983 claim in the United States District Court for the District of Oregon, the claim would have been dismissed for failure to exhaust state administrative remedies. The McNary majority would so hold as a matter of comity. The four concurring justices in *McNary* and (as we read the decisions) the *Patsy* and *Felder* courts would so hold because requiring exhaustion is consistent with the congressional intent known in the Tax Injunction Act. This does not mean that a *state* must, as a matter of federal law, impose a similar exhaustion requirement before it permits *its* courts to entertain such actions; neither Congress nor the federal courts has purported to control state trial procedure in such a way. What it does mean, we believe, is that a state *may* impose such a requirement *withhold offending* federal law.

We understand *McNary* to hold that, given the prime importance of noninterference with state taxing practices, Congress' purposes in enacting 42 USC § 1983 will not be defeated by requiring that complaining taxpayers first exhaust their state administrative remedies. If Congress' purposes will not be defeated by such a requirement in federal court, we cannot conceive how those purposes would be any more thwarted by imposition of precisely the same kind of procedural requirement when the § 1983 action is brought in state court. We therefore

hold that ORS 305.275(4), which imposes such an exhaustion requirement, is constitutionally valid. The Oregon Tax Court did not err in relying on it in dismissing Taxpayers' claim.

Taxpayers argue, alternatively, that *McNary* was premised on the assumption that the plaintiffs in that case could bring their claims immediately in state court, without going through their state's administrative procedures. They quote and rely on the last sentence of the majority opinion in *McNary*, where the Court stated: "[T]he Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court." *Fair Assessment in Real Estate v. McNary*, *supra*, 454 US at 116.

The quoted sentence does not mean what Taxpayers claim it means. That becomes clear when one reads the entire paragraph of which the quoted sentence was merely the last part:

> "The adequacy of available Missouri remedies is not at issue in this case. The District Court expressly found 'that [petitioners] have means to rectify what they consider an unjust situation through the state's own processes,' and petitioners do not contest this finding. *In addition*, the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court."

Id. (Emphasis supplied.) (Citation omitted.) The words, "[i]n addition," make it clear that the Court contemplated the Missouri procedure as an integrated whole, with administrative procedures followed by a § 1983 action, if necessary. Taxpayers' argument to the contrary is wrong.[7]

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[7] Taxpayers also rely on a single sentence from *Pennhurst State School & Hosp. v. Halderman*, 465 US 89, 122, 104 S Ct 900, 79 L Ed 2d 67 (1984). The sentence is: "Challenges to the validity of state tax systems under 42 U.S.C. § 1983 also must be brought

Taxpayers further argue that, if this court holds that exhaustion of administrative remedies will be required before Taxpayers can bring their § 1983 action, then we will somehow be "us[ing *McNary*] as a guide to our invitation for state courts to decline jurisdiction." We do not deny that there is state court jurisdiction; we hold simply that the legislature has interposed a constitutionally permissible administrative process that must be followed before a plaintiff has standing to invoke the jurisdiction of the Oregon trial court.

Although we have heretofore limited our discussion of the exhaustion requirement of ORS 305.275(4) to the Oregon Tax Court, the same requirement applies to an action in any other court initiated by Taxpayers that challenges the validity of the Oregon retirement income tax laws. ORS 305.275(4) provides that "no person shall appeal to the Oregon Tax Court or other court on any matter arising under the revenue and tax laws * * * unless the person first exhausts the administrative remedies provided before the [D]epartment and the director."

Administrative remedies available to the Taxpayers include a request for declaratory and injunctive relief, as well as for refunds. We do not read ORS 305.275(4) so narrowly as to limit the scope of the exhaustion requirement to those cases where the revenue system has generated a ruling that can be appealed. If the law provides an adequate administrative remedy, then ORS 305.275(4) requires that it be exhausted before a court challenge may be prosecuted.[*]

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in state court. *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 US 100 (1981)." The sentence was part of a paragraph illustrating the idea that federal claims sometimes are adjudicated in state courts. It cannot be bootstrapped into a holding that such cases must be brought in state court without exhaustion of administrative remedies.

[*] In agreeing that there is, after exhaustion of administrative remedies, jurisdiction in the Oregon court system to entertain Tax-

Taxpayers further argue that, even if they are required to pursue their administrative remedies with respect to the damages portion of their § 1983 action, this court

> "must nevertheless reverse that portion of the order [of the Oregon Tax Court] dismissing [Taxpayers'] claims of declaratory and injunctive relief under § 1983. The Supreme Court has consistently held that plaintiffs may bring actions for declaratory and injunctive relief directly into court where plaintiffs seek relief from state officials acting outside the bounds of their constitutional or jurisdictional authority." (Citation omitted).

Taxpayers are mistaken. We note, first, that there can be no doubt that, under the statutes regulating the Department and the Oregon Tax Court, Taxpayers are required to exhaust their administrative remedies with respect to declaratory relief.[9] ORS 305.105 provides:

> "The Department of Revenue in its discretion may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. The department shall prescribe by rule the form, content and procedure for submission, consideration and disposition of such pe-

payers' § 1983 action, we are not expressing any opinion as to just *where* in that system the appropriate forum is. This case does not require us to determine whether the appropriate forum is, as the parties appear to believe, the Oregon Tax Court, or is, instead, the circuit court. *See Sanok v. Grimes*, 294 Or 684, 662 P2d 693 (1983) (holding that a taxpayer's claims for damages from an assessor and an appraiser, even where coupled with other claims arising under the tax laws, were outside the jurisdiction of the Tax Court).

[9] What we say about declaratory relief applies equally to injunctive relief, inasmuch as Taxpayers' theory for injunctive relief in this regard is that they would be entitled to an injunction in furtherance of the declaratory relief that they believe a court would give them.

> titions. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the department and all parties to the proceedings on the state of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the Oregon Tax Court and Supreme Court in the manner provided by ORS 305.445[, which governs appeals to the Tax Court and to the Supreme Court in taxation cases generally]."

The statutory reference to "statute enforceable" was added by the 1989 Legislative Assembly. Or Laws 1989, ch 414, § 2. The language appears to be a direct legislative response to *Portland Adventist Medical Center v. Sheffield*, 303 Or 197, 735 P2d 371 (1987), a case in which the Tax Court entertained an original proceeding for declaratory relief. The direct proceeding was necessary because, at the time, the Department had statutory authority to provide declaratory relief with respect to the meaning of rules, but not with respect to the meaning of tax statutes.

There now being a state statutory exhaustion requirement for declaratory rulings such as that sought by Taxpayers here, it would be anomalous indeed to hold that, while Congress intended that federal courts not intervene in such a process, Congress nonetheless intended that state courts *must* interfere in it. Both the majority and concurring opinions in *McNary* relied on a long line of federal cases making it clear that, as a matter of comity, federal courts will not enjoin state officers in the assessment and collection of taxes, nor will they grant declaratory relief that would have the same effect. *See, e.g., Great Lakes Co. v. Huffman*, 319 US 293, 63 S Ct 1070, 87 L Ed 1407 (1943) (illustrating rule). We see no constitutional or other basis for suggesting, much less holding, that Congress nevertheless intended that state courts may not withhold similar relief upon the same terms.

2. Adequacy of State Administrative Remedy

Taxpayers argue next that it is inappropriate to require them to exhaust their administrative remedies pursuant to ORS 305.275(4) because the administrative remedies available from the Department would be inadequate as a matter of law for one or another of the following reasons: (1) the Department does not have jurisdiction to entertain an action brought under 42 USC § 1983; (2) the Department lacks authority to declare a taxing scheme unconstitutional, which Taxpayers' claims would require it to do; (3) the Department lacks authority to award Taxpayers the punitive damages they seek in connection with their 42 USC § 1983 claim; and (4) Defendants have demonstrated a predisposition to disallow Taxpayers' claims, making exhaustion a futile gesture. We address each of these assertions in turn.

(a) Department cannot entertain § 1983 actions

Taxpayers assert that requiring them to exhaust their administrative remedies with respect to their claim under 42 USC § 1983 is inappropriate because, they argue, such an effort would be futile as a matter of law. The Department cannot afford them the relief they seek under the federal statute; only a court can do that.[10]

This argument misses the point. It is true, as Defendants concede, that the Department cannot award Tax-

[10] As suggested by footnote 8, *ante*, Taxpayers' argument may prove too much. There is a real question in this case as to whether *the Oregon Tax Court itself* can provide Taxpayers the relief that they seek under 42 USC § 1983. The parties in this case appear to believe that the Tax Court, having the "same powers as a circuit court" under ORS 305.405, can entertain such claims. That is less clear to us. We have determined that we need not answer this question, however, because our disposition of this case makes it premature to address the issue. *See Sanok v. Grimes, supra* n 8, 294 Or at 698 n 22 (in determining whether particular claims fall within the jurisdiction of the Oregon Tax Court, resolution of the jurisdictional question does not require determining whether any particular set of allegations otherwise states an actionable claim).

payers damages under 42 USC § 1983. But the Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system. And, if Taxpayers do obtain that relief, they have no further claim. *Oregon State Police Assn. v. State of Oregon*, 308 Or 531, 537-39, 783 P2d 7 (1989) *cert den* —— US ——, 111 S Ct 44 (1990). Thus, it is appropriate to require Taxpayers to exhaust their administrative remedies, even if the Department cannot award relief under 42 USC § 1983.[11]

Moreover, this argument, like certain other of Taxpayers' arguments, proves too much. If, as always will be the case, state administrative agencies are unable to award damages and other forms of relief contemplated by § 1983, the *McNary* decision is necessarily wrong. Why require exhaustion—particularly under the *McNary* majority's theory, which is that exhaustion is necessary under the court-made doctrine of noninterference with state taxation procedures—if an action under 42 USC § 1983 always will follow in any event? We hold that Taxpayers are not excused from exhausting their state administrative law remedies on the ground that the Department authority to grant them all the relief they seek under 42 USC § 1983.

(b) Department cannot declare statutes unconstitutional

Taxpayers argue that Oregon administrative bodies, including the Department, lack authority to declare that

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[11] The burden attendant in pursuing the administrative remedy apparently is not, itself, a ground for separate relief so long as the administrative process produces all that the taxpayer claimed to be entitled to at the outset. *See Rosewell v. LaSalle National Bank*, 450 US 503, 101 S Ct 1221, 67 L Ed 2d 464 (1981) (repeated improper assessment of property, necessity of repeated appeals, two-year delay in obtaining refund of taxes paid under protest, and lack of any interest paid on refunded amounts not enough to excuse federal district courts from compliance with Tax Injunction Act).

a particular statute or rule is unconstitutional and, therefore, Taxpayers are not required to exhaust their administrative remedies because the Department could not declare the disparity between ORS 237.201 and 316.680 (1)(c) constitutionally impermissible.

Taxpayers are wrong in their premise. Although it is an authority to be exercised infrequently, and always with care, Oregon administrative agencies have the power to declare statutes and rules unconstitutional. *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 723 P2d 298 (1986); *see also Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989) (recognizing same principle).

(c) Department lacks authority to award punitive damages

Taxpayers argue that they need not exhaust their administrative remedies because they seek punitive damages, and those cannot be awarded by the Department. Again, Taxpayers have not yet suffered a harm that would require any relief under § 1983, and will not have suffered such harm unless their administrative remedies do not give them all they claim under their interpretation of the tax laws and the United States Constitution. Punitive damages are not yet relevant. *Oregon State Police Association v. State of Oregon, supra.*

(d) Exhaustion not required where allegations show that exhaustion would be futile

Taxpayers point out that they alleged in their first amended complaint that exhaustion of administrative remedies would be futitle for several different reasons. Three of these reasons, *viz.*, that the Department cannot vindicate Taxpayers' § 1983 claims, cannot declare statutes unconstitutional, and cannot award punitive damages, are not valid (as we already have demonstrated). The balance have no more substance:

(1) Taxpayers allege that Defendants have "summarily" denied claims for refunds made by others similarly situated. But that is what exhaustion of remedies is for—to see if those denials were legally correct.

(2) Taxpayers allege that Defendants have even "gone so far" as to issue deficiency notices to some who have not paid their taxes. Again, the legal correctness of such actions is what the administrative process is designed to test.

(3) Taxpayers assert that "[D]efendants' counsel have repeatedly asserted that the [D]efendants have no legal obligation to pay refunds for any tax year prior to 1989." And they may not. The retroactivity of *Davis* (if it otherwise is controlling) doubtless will be an interesting issue. Certainly, however, the fact that this question is waiting in the wings does nothing to illustrate any futility to the administrative process.

(4) Finally, Taxpayers point to Defendants' assertion to the Oregon Tax Court (and repeated to this court, in Defendants' brief) that Defendants believe that the *Davis* case was wrongly decided. Perhaps Defendants simply are protecting their record for a possible petition for certiorari or appeal to the Supreme Court of the United States, but protecting the record is not the same thing as demonstrating the kind of implacable hostility toward Taxpayers that otherwise might cause this court to consider whether exhaustion of administrative remedies was required.

We hold that none of Taxpayers' allegations creates a basis for excusing Taxpayers from the required exhaustion of their administrative remedies. In so holding, we need not consider whether the Defendants are correct in their alternative argument that Taxpayers may not be excused from exhaustion of administrative remedies on grounds of futility where, as in the present case, the exhaustion requirement in this case is created by statute.

rather than as a court-made rule, and, therefore, cannot be modified by court-made doctrines.

3. Exhaustion of Administrative Remedies Is Excused

Finally, Taxpayers assert that they are excused from exhausting their administrative remedies because none of the objectives that are forwarded by the doctrine of exhaustion of administrative remedies would be served by applying the doctrine in this case, and Taxpayers therefore are "relieved of such a burden."

We disagree. If Taxpayers exhaust their administrative remedies and, in the process, obtain the relief under the Oregon personal income tax laws they seek, the need for this § 1983 litigation vanishes. That is sufficient reason to require exhaustion.[12]

CONCLUSION

We hold that the Oregon Tax Court correctly interpreted ORS 305.275(4) to require Taxpayers in this case to exhaust their administrative remedies with respect to their claim for damages and other relief under 42 USC § 1983. Taxpayers have not, in their brief to this court, suggested that the Tax Court erred in applying the doctrine of exhaustion of administrative remedies to Taxpayers' other claims in their first amended complaint, and it does not appear to us that the Tax Court erred in that regard. It follows that the decision of the Tax Court should be affirmed.

The judgment of the Oregon Tax Court dismissing Taxpayers' complaint is affirmed.

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[12] Again, it also may be true that, because the exhaustion requirement in this case was created by statute, lack of the usual justifications for requiring exhaustion would be irrelevant. Because we find Taxpayers' argument on this point not well taken as to the merits, we need not address this alternative basis for our holding.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[X] No costs allowed. [ ] Costs allowed, payable by:

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

MONEY JUDGMENT

	Judgment #1	Judgment #2 *
Creditor:	_____	State of Oregon, Judicial Department
Debtor:	_____	_____
Amount: Costs:	_____	Unpaid filing fee:
Attorney Fees	_____	
TOTAL:	_____	$ _____

Interest: Simple, 9% per annum, from the date of this appellate judgment.

* Judgment for unpaid filing fees. ORS 19.605(1)(c).

This box to be completed when the appellate judgment issues. See ORAP 14.05.

NOTICE OF EXPENSES AND COMPENSATION UNDER ORS 138.500(4)

The appellate court has affirmed the conviction in this criminal case and has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665(2) to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The

court has certified expenses and compensation in the amount of $————————.

This box to be completed when the appellate judgment issues. See ORAP 14.05.

Appellate Judgment Effective Date:

SUPREME COURT
(seal)

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

Oregon Tax Court Case No. 2867

SC S36652

EDWIN S. and AGNES D. NUTBROWN, husband and wife; DONALD R. and THERESA PAAPE, husband and wife; HOWARD R. and MARGARET E. CLEARY, husband and wife; NORMAN L. and GLORIA MINKS' SUCCESSOR-IN-INTEREST, husband and wife; JAMES M. and MARGARET JACKSON, husband and wife; ELENOR JEAN and FELIX ERRO, husband and wife; JAMES F. SIMPSON and TERRI D. DILL-SIMPSON, husband and wife; LOUIS Z. and LORNA K. PERKINS, husband and wife; on behalf of themselves and all present and former residents of Oregon who were paid retirement benefits by the United States Government and were or are subject to Oregon state income taxation thereon in any year during the period 1979 forward; and all others similarly situated,

Plaintiffs-Appellants,
Petitioners on
Reconsideration,

v.

RICHARD A. MUNN, individually and as Director of the Department of Revenue of the State of Oregon; ROBYN GODWIN, individually and as prior Director of the Department of Revenue of the State of Oregon; JOHN J. LOBDELL, individually and as prior Director of the Department of Revenue of the State of Oregon; all the unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former Directors of the Department of

Revenue of the State of Oregon, or at the direction of the current and former Directors of the Department of Revenue of the State of Oregon and the DEPARTMENT OF REVENUE, State of Oregon,

Defendants-Respondents,
Respondents on
Reconsideration.

ORDER DENYING RECONSIDERATION

The court has considered the petition for reconsideration and Orders that it be denied.

DATE: June 20, 1991

/s/ Edwin J. Peterson
EDWIN J. PETERSON
Chief Justice

c: Gary I. Grenley
Michael Charles Zusman
John Brant Gould
Eugene O. Duffy
Robert M. Atkinson

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE ST., SALEM, OR 97310

jk
A:RCD14.SC

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OREGON

(TC 2867; SC S36652)

EDWIN S. and AGNES D. NUTBROWN, husband and wife; DONALD R. and THERESA PAAPE, husband and wife; HOWARD R. and MARGARET E. CLEARY, husband and wife; NORMAN L. and GLORIA MINKS' SUCCESSOR-IN-INTEREST, husband and wife; JAMES M. and MARGARET JACKSON, husband and wife; ELENOR JEAN and FELIX ERRO, husband and wife; JAMES F. SIMPSON and TERRI D. DILL-SIMPSON, husband and wife; LOUIS Z. and LORNA K. PERKINS, husband and wife; on behalf of themselves and all present and former residents of Oregon who were paid retirement benefits by the United States Government and were or are subject to Oregon state income taxation thereon in any year during the period 1979 forward; and all others similarly situated,

Appellants,

v.

RICHARD A. MUNN, individually and as Director of the Department of Revenue of the State of Oregon; ROBYN GODWIN, individually and as prior Director of the Department of Revenue of the State of Oregon; JOHN J. LOBDELL, individually and as prior Director of the Department of Revenue of the State of Oregon; all the unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former Directors of the Department of Revenue of the State of Oregon, or at the direction of the current and former Directors of the Department of Revenue of the State of Oregon and the DEPARTMENT OF REVENUE, State of Oregon,

Respondents.

Appeal from Oregon Tax Court
Carl N. Byers, Judge

Argued and submitted May 2, 1990

Eugene O. Duffy, Milwaukee, Wisconsin, argued the cause for appellants. With him on the briefs were Gary I. Grenley and Michael C. Zusman of Grenley, Rotenberg, Laskowkie, Evans & Bragg, P.C., Portland, O'Neil, Cannon & Hollman, S.C., Milwaukee, Wisconsin, and John B. Gould, Portland.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause on behalf of the respondents. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Peterson, Chief Justice, and Carson, Gillette, Van Hoomissen, Fadeley, and Unis, Justices.

GILLETTE, J.

The judgment of the Oregon Tax Court dismissing Taxpayers' complaint is affirmed.

Case Name: *Nutbrown v. Munn*

Appellate case number(s): SC S36652

Trial court or agency case number: 2867

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party(ies): Respondents

[X] No costs allowed. [ ] Costs allowed, payable by:

Appellate Judgment Effective Date: July 8, 1991

SUPREME COURT
(seal)

APPENDIX D

IN THE OREGON TAX COURT

Personal Income Tax

No. 2867

EDWIN S. and AGNES D. NUTBROWN, *et al.*,
Plaintiffs,

v.

RICHARD A. MUNN, *et al.*,
Defendants.

ORDER

[Filed Oct. 4, 1989]

This matter is before the court on defendants' motions to strike and to dismiss. Defendants' motion to dismiss rests primarily on the ground that plaintiffs have failed to exhaust their administrative remedies. Defendants also assert additional grounds of statute of limitations, immunity from claims, mootness and a failure to state claims. Defendants' motion to strike is directed at paragraph 49 of plaintiffs' complaint on the grounds that it fails to comply with Tax Court rules and contains evidentiary matter.

The parties have submitted written memoranda in support of their positions and the court heard oral arguments on September 28, 1989.

Plaintiffs' complaint is entitled:

> "First Amended Class Action Complaint For Declaratory Judgment, Injunctive And Monetary Relief (Civil Rights, Quasi-Contract, Constructive

> Trust, Claim For Refund, Set Aside Assessment And Mandamus)."

Defendants' motions test only the sufficiency of plaintiffs' allegations. Since the court is not ruling on the merits of plaintiffs' claims but only on the merits of the pleadings, its discussion of the issues will be brief.

The first and primary claim of plaintiffs seeks declaratory relief, damages and attorney fees under 42 USC § 1983. That statute creates a federal cause of action for violations of an individual's constitutional rights. Defendants' motions raise the issue of exhaustion on two different levels as to this claim. The question on the first level is: must plaintiffs, who seek relief in a state court under a federal statute, first exhaust their state administrative remedies? If the answer to that question is in the affirmative, then a second question is: must plaintiffs exhaust their administrative remedies where they challenge the constitutionality of a statute? Plaintiffs assert that administrative agencies have no authority to rule on the constitutionality of a statute and any exhaustion requirement would be a useless act.

Resolving the issue on the first level requires reconciling United States Supreme Court cases which, on their face, do not appear entirely consistent. In the first instance, plaintiffs assert that the United States Supreme Court has flatly ruled out the need for exhaustion of state administrative remedies. In *Patsy v. Florida Board of Regents*, 457 US 496, 516, 102 S Ct 2557, 73 L Ed 2d 172, 188 (1982), the court stated:

> "[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."

The problem, of course, is that courts decide the cases before them and not general propositions. In making the statement in *Patsy*, was the court overruling its position in *Fair Assessment In Real Estate v. McNary*, 454 US

100, 116, 102 S Ct 177, 70 L Ed 2d 271, 283 (1981)? There the court said:

> "[W]e hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by *state remedies*, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." (Emphasis added.)

Counsel for plaintiffs contend that in using the term "state remedies" the Supreme Court meant state judicial remedies, not administrative remedies. However, Justice Brennan's concurring opinion in that case, joined in by Justices Marshall, Stevens and O'Conner, makes it clear that it is exhaustion of state administrative remedies that the court had in mind.

> "Surely a somewhat lesser showing is required where, as here, we are concerned not with the displacement of the § 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state *administrative process*." *Id*, at 454 US 136 and 70 L Ed 2d 296.)

In essence, *Fair Assessment* seems to suggest that a § 1983 claim has not matured under a state tax law until the state remedies, including administrative remedies, have been exhausted. Only then can the court determine whether the individual has been deprived of his or her constitutional rights.

Plaintiffs cite two additional cases subsequent to *Fair Assessment* which indicate that no exhaustion of administrative remedies is necessary. In *Felder v. Casey*, 487 US ——, 108 S Ct 2302, 101 L Ed 2d 123 (1988), the United States Supreme Court found a Wisconsin notice-of-claim statute inconsistent with the federal law. Reiterating its views that § 1983 claims are "judicially en-

forceable in the first instance," (*Id*, 101 L Ed 2d, at 144) the court rejected any administrative process which would require the "injured persons to seek satisfaction from those alleged to have caused the injury in the first place." (*Id*, 101 L Ed 2d, at 145.)

The second case cited by plaintiffs is an Oregon Supreme Court case, *Rogers v. Saylor*, 306 Or 267, 760 P2d 232 (1988). In that case, the court, applying the federal statute, held that a statutory limit on tort claims against public bodies was preempted by the federal law. It stated:

> "A state cannot limit the amount a plaintiff can recover in a section 1983 action, *just as it cannot require that the plaintiff first submit his claims to the government.*" (*Id*, at 278) (Emphasis added.)

Consistent with the United States Supreme Court cases cited by plaintiffs, the Oregon Supreme Court noted that "[a] contrary holding would create a distinction between a section 1983 claim in state or federal courts." (*Id*, at 283.)

However, these cases are not tax cases. The Supreme Court, in *Fair Assessment*, makes it clear that challenges to a state's tax system are to be treated differently from other kinds of section 1983 claims. That case has been so construed by other states which have been called on to apply its holding. *See Stufflebaum v. Panethiere*, 691 SW2d 271 (Mo S Ct 1985); *Raschke v. Blancher*, 141 Ill App 3d 813, 491 NE2d 1171 (1986); and *Linderkamp v. Bismark School District No. 1*, 397 NW2d 76 (ND S Ct 1986). Accordingly, this court finds that plaintiffs are not excused from exhausting their administrative remedies when asserting a section 1983 claim challenging a state tax system.

Having reached this conclusion, are plaintiffs nevertheless excused where plaintiffs challenge the constitutionality of the statute? That is, can the administrative agency do anything except affirm because it has no au-

thority to rule on the constitutionality of a statute? This issue may not be as free from doubt as plaintiffs assert. For example, ORS 305.115(4) requires the Department of Revenue in its opinion and order to determine "all" questions of law and fact raised by taxpayer. Perhaps most significant, however, is the point that the requirement of exhaustion of administrative remedies is not judicially imposed. Rather, it is mandated by the legislature. Hence, a failure to meet this condition deprives this court of jurisdiction. As stated by the Oregon Supreme Court in *Dennehy v. Dept. of Rev.*, 295 Or 574, 579, 668 P2d 1210 (1983):

> "The fact that plaintiff was before the Tax Court completely devoid of any administrative record to review is important to our decision. Although the Tax Court hears appeals from the department *de novo*, it is clear from the statutory scheme establishing the Tax Court that it is to decide whether to set aside administrative orders or determination and not to proceed without any such order or determination in actions such as the instant case. *See* ORS 305.425(2); ORS 305.845.
>
> "Other jurisdictions have reached the same conclusion we reach when confronted with challenges to the constitutionality of tax assessments. The United States Supreme Court has pronounced that '[a] taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity.' *Gorham Mfg. Co. v. Tax Commission*, 266 US 265, 269-70, 45 S Ct 80, 69 LEd 279 (1924) (constitutional attack against New York State tax on foreign corporations).
>
> "We conclude that plaintiff was statutorily required to exhaust administrative remedies, that he

> failed to do so, and that therefore the Tax Court lacked jurisdiction to entertain his complaint."

For these reasons, plaintiffs' first claim must be dismissed.

Plaintiffs' second claim, in quasi-contract, and plaintiffs' third claim, in constructive trust, must also be dismissed. Both of these claims are barred for the reason that the state has not waived its immunity. ORS 30.265 (3)(b). If such claims are to be brought in this court because they arise from questions of law or fact arising under the tax laws of this state,[1] plaintiffs must first exhaust their administrative remedies. ORS 305.275(4).

Plaintiffs' fourth claim is for refund. There can be no doubt that under Oregon statutes a taxpayer must exhaust his administrative remedies before coming to Oregon Tax Court. ORS 305.275(4). Plaintiffs fail to allege compliance with this requirement.

Plaintiffs' fifth claim is to set aside asessments. This claim must also be dismissed. ORS 305.265(15) provides for taxpayers to appeal from assessments to the Department of Revenue. ORS 305.280 provides that a failure to appeal to the department causes the assessment to become final. A taxpayer who permits an assessment to become final waives the right to judicial review. *Ebert v. Dept. of Rev.*, 307 Or 649, —— P2d ——, (1989). Plaintiffs fail to allege either compliance with the statute or reasonable excuse from such compliance.

Plaintiffs concede that their sixth claim for mandamus should be dismissed.

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[1] There is some question whether such claims may be brought in Tax Court since the claim does not affect tax liability. In *Sanok v. Grimes*, 294 Or 684, 701, 662 P2d 693 (1983), the Supreme Court said:

> "In summary, we hold that a claim is not one 'arising under the tax laws' unless it has some bearing on tax liability. Therefore, plaintiff's tort claims against tax assessors are not within the subject-matter jurisdiction of the tax court."

Having determined that none of the claims in plaintiffs' amended complaint allege facts which place jurisdiction in this court, the court finds that plaintiffs' amended complaint must be dismissed. This being the case, it is unnecessary for the court to rule on defendants' other motions. Now, therefore,

IT IS ORDERED that plaintiffs' Amended Complaint be, and hereby is, dismissed.

Dated this 4th day of October, 1989.

/s/ Carl H. Byers
Judge

APPENDIX E

IN THE OREGON TAX COURT

Personal Income Tax

No. 2867

EDWIN S. and AGNES D. NUTBROWN, *et al.*,
Plaintiffs,
v.
RICHARD A. MUNN, *et al.*,
Defendants.

JUDGMENT

[Filed Oct. 18, 1989]

THIS MATTER came before the court on defendants' motions to dismiss plaintiffs' amended complaint. The court has considered the written and oral submissions of the parties, and on October 4, 1989, issued an order dismissing plaintiffs' amended complaint on the ground that the court lacks jurisdiction to hear the complaint before plaintiffs exhaust their administrative remedies. Plaintiffs had also submitted a petition for alternative writ of mandamus. By letter dated October 5, 1989, plaintiffs advised the court that in view of its ruling on defendants' motions to dismiss, they wish to withdraw the petition. NOW, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' amended complaint and petition for alternative writ of mandamus are dismissed. No costs to either party.

DATED this 17th day of October, 1989.

s Carl N. Byers
Oregon Tax Court Judge

Submitted by Elizabeth S. Stockdale
Counsel for Defendants

APPENDIX F

EXCERPTS OF RELEVANT OREGON REVISED STATUTES

Section 305.046(1): Except as otherwise provided by law, the director shall coordinate all of the activities of the department, and has the power of general supervision over the administration of each division within the department, and the administrative head thereof, and is directly responsible to the Governor therefor.

Section 305.105: The Department of Revenue in its discretion may, on petition by any interested person, issue a declaratory ruling with respect to the [validity or] applicability to any person, property or state of facts of any rule or [regulation promulgated] by it. . . . Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the department and all parties to the proceedings on the state of facts alleged, unless it is altered or set aside by the court. A ruling shall be subject to review in the Oregon Tax Court and the Supreme Court in the manner provided by ORS § 305.445.

[Section 305.105 was amended by Or. Laws 1989, Ch. 414, § 2, first effective on and after October 3, 1989, by deleting the bracketed words and adding in place of "regulation promulgated" the words "statute enforceable."]

Section 305.115(1): The director shall make the final determinations on all petitions and appeals which are to be written into orders subject to appeal to a court of law. . . .

Section 305.265(5): Within 30 days from the date of the notice of deficiency, the person given notice shall pay the deficiency with interest computed to the date of payment and any penalty proposed. Or within that time the person shall advise the department in writing of objec-

tions to the deficiency, and may request a conference with the department, which shall be held prior to the expiration of the one-year period set forth in subsection (7) of this section.

Section 305.270(3): Upon receipt of a claim for refund, or original report or return claiming a refund, the department shall either refund the amount requested or send to the claimant a notice of any proposed adjustment to the refund claim, stating the basis upon which the adjustment is made. A proposed adjustment may either increase or decrease the amount of the refund claim or result in the finding of a deficiency. If the proposed adjustment results in a determination by the department that some amount is refundable, the department may send the claimant the adjusted amount with the notice.

(4): The claimant may, within 30 days of the date of the notice of proposed adjustment, advise the department in writing of objections to the refund adjustment and may request a conference with the department, which shall be held within one year of the date of the notice. The department shall notify the claimant of a time and place for the conference, and appoint a conference officer to meet with the claimant for an informal discussion of the claim. After the conference, the conference officer shall send to the claimant, by certified mail, a determination of the matter, and include therewith either a notice of refund denial or payment of any amount found to be refundable, together with any applicable interest provided by this section. If the conference officer determines that a deficiency exists, the officer shall include a notice of assessment with the determination.

Section 305.275(4): Except as provided in ORS 118.350 and 305.410, no person shall appeal to the Oregon Tax Court or any other court on any matter arising under the revenue and tax laws administered by the department [of Revenue] unless the person first exhausts the admin-

istrative remedies provided before the department and the director [of the Department of Revenue].

(5): All appeals shall be taken by filing a petition with the director at Salem, Oregon, which shall constitute the perfection of the appeal. The petition shall state the facts relied upon for relief, a description of any property involved, any statement or proposition of law relied upon, the relief requested, and shall bear the signature of the petitioner or the authorized representative of the petitioner.

Section 305.280(1): An appeal under ORS 305.275(1) shall be filed within 90 days after the act or omission becomes actually known to the person, but in no event later than one year after the act or omission has occurred.

(2): An appeal . . . from any notice of assessment or refund denial issued by the Department of Revenue with respect to a tax imposed under . . . this chapter, or collected pursuant to ORS 305.620, shall be filed within 90 days from the date of the notice. An appeal from a proposed adjustment under ORS 305.270 shall be filed within 90 days from the date the notice of adjustment is final.

Section 305.405: As part of the judicial branch of state government, there is created a court of justice to be known as the Oregon Tax Court. The Tax Court, in cases within its jurisdiction pursuant to ORS 305.410:

(1) Is a court of record and of general jurisdiction, not limited, special or inferior jurisdiction.

(2) Has the same powers as a circuit court.

(3) Has and may exercise all ordinary and extraordinary legal, equitable and provisional remedies available in the circuit courts, as well as such additional remedies as may be assigned to it.

Section 305.410: [T]he tax court shall be the sole, exclusive and final judicial authority for the hearing and de-

termination of all questions of law and fact arising under the tax laws of this state.

Section 305.419: Except as provided in subsection (3) of this section, in any appeal from an order of the department involving a deficiency of taxes imposed or measured by net income, the tax assessed, and all penalties and interest due, shall be paid to the department on or before the filing of a complaint with the regular division of the Oregon Tax Court under ORS 305.560. The complaint shall be filed as a claim for refund.

Section 305.560(1): Except for an order, or portion thereof, denying the discretionary waiver of penalty or interest by the department, an appeal from an order of the department on an appeal taken pursuant to this chapter may be taken by filing an original and one certified copy of a complaint with the clerk of the Oregon Tax Court at its principal office at Salem, Oregon within 60 days after a copy of the order or notice of the order has been served upon the appealing party by mail. . .

Section 305.990(4): Violation of ORS 305.815 is punishable, upon conviction, by a fine of not more than $1,000 or by imprisonment for not more than one year in the county jail, or both.

Section 305.992(1): If any returns required to be filed under ORS chapter . . . 314 . . . are not filed for three consecutive years by the due date (including extensions) of the return required for the third consecutive year, there shall be a penalty for each year of 100 percent of the tax liability determined after credits and prepayments for each such year.

(2): The penalty imposed under this section is in addition to any other penalty imposed by law. However, the total amount of penalties imposed for any taxable year under this section, ORS 305.265(13) and 314.400 shall not exceed 100 percent of the tax liability.

Section 314.400(1): If a taxpayer (a) fails to file a report or return of tax liability or of income at the time prescribed therefor, or (b) fails to pay a tax at the time the tax becomes due, there shall be added to the amount of tax required to be shown as tax on the report or return a delinquency penalty of five percent of the amount of such tax.

(2): If the failure to file a report or return continues for a period in excess of three months after the due date:

(a) There shall be added to the amount of tax required to be shown on the return a failure to file penalty of 20 percent of the amount of such tax; and

(b) Thereafter the department may send a notice and demand to the person to file a report or return within 30 days of the mailing of the notice. If after such notice and demand no return or report is filed within the 30 days, the department may determine the tax according to the best of its information and belief, assess the tax with appropriate penalty and interest plus an additional penalty of 25 percent of the tax deficiency determined by the department and give written notice of the determination and assessment to the person required to make the filing.

(3): A penalty equal to 100 percent of any deficiency determined by the department shall be assessed and collected if:

(a) There is a failure to file a report or return with intent to evade the tax;

(b) A report or return was falsely prepared and filed with intent to evade the tax; or

(c) A false claim was intentionally filed under ORS 310.630 to 310.690.

Section 314.525(3): Interest shall accrue on the underpayment of estimated tax under ORS 314.505 to 314.525

at the rate established under ORS 305.220, for each month or fraction thereof during which period the estimated tax or any installment thereof remains unpaid. The penalty provisions contained in this chapter and ORS chapters 317 and 318 for underpayment of tax shall not apply to underpayments of estimated tax under ORS 314.505 to 314.525.

Section 316.992(1): The department shall assess a penalty of $250 against any individual who files what purports to be a return of the tax imposed by this chapter but which:

(a): Does not contain information on which the substantial correctness of the self-assessment may be judged; or

(b): Contains information that on its face indicates that the self-assessment is substantially incorrect.

REFUND STATUTE

Section 305.270: [I]f the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed . . . or collected . . . or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified . . . any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.

APPENDIX G

EXCERPT FROM QUESTIONS PRESENTED ON APPEAL BY PETITIONERS BEFORE THE OREGON SUPREME COURT

2. As to *all* of the Plaintiffs' claims for relief in their First Amended Class Action Complaint:

   A. Does the DOR have authority to declare a statutory taxing scheme invalid or unconstitutional?

   B. Assuming the DOR does not have subject matter jurisdiction to entertain a § 1983 action brought against defendants in their individual capacities, or authority to grant injunctive relief against its Director, or authority to declare a taxing scheme unconstitutional and or award punitive damages against its Director in his individual capacity, do plaintiffs have adequate administrative remedy available to them?

   C. Is it error for the tax court to:

      (1) fail to address an issue squarely before it, namely, whether the defendants have a predisposition to deny the relief sought by the plaintiffs; or

      (2) dismiss an action for failure to exhaust administrative remedies where the complaint has properly pleaded that resort to such administrative procedures would be futile?

   D. Is resort to administrative remedies required in an action solely involving legal and constitutional issues, the resolution of which do not involve and/or require the expertise of the administrative agency? (emphasis added)

APPENDIX H

EXCERPTS FROM FIRST AMENDED CLASS ACTION COMPLAINT

FOURTH CLAIM FOR RELIEF
(Claim for Refund)

* * * *

(38) On or about April 17, 1989, the Defendant Department of Revenue through its counsel and/or director announced that no refunds would be issued for tax years prior to 1989 on account of the unlawful taxation of retirement benefits paid by the United States Government.

* * * *

(41) Some of the Plaintiffs and others similarly situated have filed claims for refund with the Defendant Department of Revenue for one or more of the tax years here in issue claiming refund of the unlawfully collected taxes, and some of the Plaintiffs and others similarly situated have not filed any claims for refund of said taxes. As a matter of law, such Plaintiffs and others similarly situated are not required to either await a determination by the Defendant Department of Revenue or to file said claims for refund because either course of action would now be futile.

(2)

No. 91-457

FILED
OCT 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN S. NUTBROWN, *et al.*,
Petitioners,

v.

RICHARD A. MUNN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully invite the Court's attention to the following new matters which have arisen since the filing of the petition in this case. After the Supreme Court of Tennessee announced its decision in the case of *L.L. Bean, Inc. v. Bracey*, —— S.W.2d ——, 1991 WL 195305 (Tenn. 1991), on October 2, 1991 taxpayer *Bean* invoked the jurisdiction of the U.S. District Court in Nashville, seeking declaratory and injunctive relief under 42 U.S.C. § 1983.[1] *See L.L. Bean, Inc. v. Huddleston,*

[1] The *Bean* decision is discussed in the Petition in this case at 6. It is also discussed in the Petitioners' Supplemental Brief in Support of Petition for a Writ of Certiorari in the case of *Hogan v. Musolf, petition for cert. filed,* No. 91-380, at 1-2.

C.A. No. 3-91-0817 (M.D. Tenn.). Bean asserts in its District Court complaint that the Tax Injunction Act is inapplicable because the Tennessee Supreme Court has explicitly determined that *Bean* has no available state court remedy. App. A at 1a. The refusal of the Tennessee Supreme Court in *Bean* to exercise its jurisdiction under 42 U.S.C. § 1983, just like the refusal of the Oregon Supreme Court in this case, demonstrates the resulting burden which is likely to fall upon the federal courts if the inverted analysis of the Tax Injunction Act utilized by the Oregon Supreme Court and by the Tennessee Supreme Court in *Bean* is permitted to stand.[2]

On September 16, 1991, the Colorado Supreme Court announced its decision in the *Davis*-related case of *Kuhn v. Colorado*, 1991 WL 179971 (Colo. 1991). Contrary to the result in this case, the Colorado Supreme Court held, in circumstances identical to those in this case, that federal retirees are not required to exhaust futile statutory administrative remedies before bringing an action challenging the constitutionality of a state taxing scheme.[3]

These recent developments further demonstrate the widening conflict among the states with respect to the obligation of state courts to hear and entertain a federal cause of action created by Congress as well as the obligation of the states to provide a clear and certain remedy that is a meaningful one.[4]

---

[2] *See* Petition at 12-16.

[3] *See* Petition at 20-22.

[4] The questions presented by the petition in this case are substantially similar to the questions presented in *Hogan v. Musolf*, No. 91-380. Like the respondents in *Hogan*, the Respondents here have also waived their right to file a brief. Petitioners note that this Court has recently postponed its consideration of the *Hogan* petition and advised the Respondents in that case of the Court's request that a brief be filed before November 22, 1991.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, Petitioners request that their petition for certiorari be granted.

Respectfully submitted,

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October 25, 1991

APPENDIX A

EXCERPTS FROM COMPLAINT IN *L.L. BEAN, INC. v. HUDDLESTON*

* * * *

JURISDICTION AND VENUE

13. Jurisdiction is based upon a federal question pursuant to 28 U.S.C. section 1331 in that the claims herein are federal constitutional claims arising under 42 U.S.C. section 1983. The Tax Injunction Act is inapplicable since *L.L. Bean* has no available state court remedy, as explicitly determined by the Supreme Court of Tennessee in *L.L. Bean, Inc. v. Bracey*, Docket No. 01S01-9010-CH-00087 (September 9, 1991). Venue is proper inasmuch as Defendants carry out business in this district.

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QUESTIONS PRESENTED

1. Must a taxpayer exhaust adequate administrative remedies mandated by state law before challenging a state tax statute in state court under 42 U.S.C. § 1983?

2a. Where state law provides for a full factual hearing followed by judicial review and in that review the state courts are available to provide the full range of relief sought by petitioners, are the state remedies adequate?

2b. May petitioners avoid the necessity of exhausting state administrative remedies simply by asserting that resort to the administrative process would be futile?

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BRIEF FOR RESPONDENT IN OPPOSITION

I. THERE IS NO CONFLICT AMONG THE STATES.

Petitioners posit the existence of a "sharp divergence of state courts" about the requirement of exhaustion of administrative remedies in tax cases brought under section 1983. Pet. Cert. 8. That assertion does not withstand event the most cursory examination.

In *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), the Oregon Supreme Court held that the courts of Oregon are open to claims brought under section 1983 for refund of taxes and other remedies if the taxpayer first exhausts administrative remedies as required by state law.[1] None of the cases upon which petitioners rely, either in their Petition or their Supplemental Brief, disagrees with that holding. Petitioners' cases hold only that the state courts will entertain section 1983 challenges, a claim with which neither the Department of Revenue (DOR) nor the Oregon Supreme Court has any quarrel. "In fact, Oregon Courts are available to hear claims under § 1983." *Nutbrown*, 311 Or at 337.[2] Many of the cases cited by petition-

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[1]"Taxpayers further argue that, if this court holds that exhaustion of administrative remedies will be required before Taxpayers can bring their § 1983 action, then we will somehow be 'us[ing *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981)] as a guide to or invitation for state courts to decline jurisdiction.' We do not deny that there is state court jurisdiction; we hold simply that the legislature has imposed a constitutionally permissible administrative process before a plaintiff has standing to invoke the jurisdiction of the Oregon Tax Court." *Nutbrown v. Munn*, 311 Or at 342.

[2]Petitioners' assertion that the Oregon Supreme Court acknowledged a split among the states, Pet. Cert. at 6 and n. 4, is inaccurate. The statement on which petitioners rely ("There is no binding case law on point") acknowledged the absence of binding precedent from this Court. *Nutbrown v. Munn*,

(continued...)

ers involve claims brought under or against state tax laws. Most, however, make no mention of a state law exhaustion requirement. None holds that such a requirement, if it existed as a matter of state law, would be excused because the claim was brought under section 1983.[3]

In *Kuhn v. Colorado*, 817 P.2d 101 (Colo. 1991), cited in petitioners' Supplemental Brief, the Colorado Supreme Court held that administrative remedies need not be exhausted in that case. The court, however, rested its decision on state law grounds, not on federal section 1983 grounds as petitioners seek to suggest. The court stated that a party challenging the constitutionality of a statute need not first exhaust the administrative remedies provided in the statute. 817 P.2d at 104. For this proposition the court cited *Fred Schmid Appliance & Television Co. v. City & County of Denver*, 811 P.2d 31, 33 (Colo. 1991). In *Fred Schmid*, the court held that an administrative agency

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[2](...continued)
supra, 311 Or. at 338; Pet. Cert. App. A at 12a. The decisions of other state courts on this issue, obviously, would not bind the Oregon Supreme Court.

[3]*See American Trucking Assns. v. Secretary of State*, 595 A.2d 1014 (Me. 1991); *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991); *Town of Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989); *Burrell v. Mississippi State Tax Comm.*, 536 So.2d 848 (Miss. 1988); *Satellink of Chicago v. City of Chicago*, 168 Ill.App.3d 689, 523 N.E.2d 13 (Ill. App. (1988); *Marx v. Truck Rental & Leasing Assn.*, 520 So.2d 1333 (Miss. 1987); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Department of Treasury v. Campbell*, 161 Mich.App. 526, 411 N.W.2d 722 (1987); *423 South Salina Street v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63 (1986); *Holden Arboretum v. City of Kirtland*, 19 Ohio App.3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash.2d 96, 690 P.2d 1144 (1984); *Bung's Bar & Grille, Inc. v. Township Council of Florence*, 206 N.J. Super. 432, 502 A.2d 1198 (1985); *Porter v. Treasurer & Collector of Taxes et al.*, 385 Mass. 335, 431 N.E.2d 934 (1982); *Kollasch v. Adamany*, 99 Wisc.2d 891 299 N.W.2d 891 (1980), *rev'd on other grounds*, 313 N.W.2d 47 (1981).

lacked authority to pass on the constitutionality of a statute.[4] *Ibid.* Thus, *Kuhn* is a state law case and does not support petitioners' claim of a conflict among the states on the federal issue they seek to present to this Court.

In *Beverly Bank v. Board of Review*, 117 Ill.App.3d 656, 453 N.E.2d 96 (1983), also cited in the petition, the court expressly stated that a careful reading of the trial court's opinion demonstrated that the court did not apply the exhaustion doctrine. 453 N.E.2d at 99. Hence, the appeals court concluded, "we will not belabor the doctrine of exhaustion of administrative remedies by further consideration." *Ibid. Beverly Bank* is illustrative of petitioners' attempt to manufacture a division among the states where none exists. Careful reading of the cases petitioners cite demonstrates no more than that the state courts agree they must entertain claims brought under section 1983. The federal cases on which petitioners rely stand for the same settled point: state courts must entertain section 1983 claims.[5]

Those state courts actually addressing the issue are unanimous in holding that a party wishing to challenge state tax laws or to seek a refund under those laws must exhaust administrative remedies mandated by state law before seeking relief under section 1983. *See Hogan v. Muslof*, 471 N.W.2d 216 (1991) *pet. cert. filed*, No. 91-380; *Raschke v. Blancher*, 141 Ill.App.3d 813, 491 N.E.2d 1171 (1986); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Stufflebaum v. Panthiere*, 691 S.W.2d 271 (Mo. 1985); *Johnston v. Gaston*

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[4]Under Oregon law, by contrast, administrative agencies, including DOR, have the authority and obligation to determine the constitutionality of statutes as applied to the cases before them. *See* p. 11, *infra*.

[5]*See* cases cited at Pet. Cert. 7 and 8 and n. 7.

County, 71 N.C.App. 707, 323 S.E.2d 381 (1984), *rev. denied* 329 S.E.2d 392 (1985); *see also Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76, 80 (N.D. 1986) (court did not address administrative remedies, but held that state law remedies must be pursued). Although the court did not require exhaustion in *Allison v. Board of County Commissioners*, 737 P.2d 6 (Kan. 1987), the basis for that decision was the inadequacy of the state remedies. 737 P.2d at 12. By looking to see whether the state remedies were adequate, the Kansas Supreme Court tacitly acknowledged that some examination of those remedies is appropriate and suggested that exhaustion of adequate administrative remedies may be required.

Petitioners' claim of a conflict among the states about the requirement of administrative exhaustion bursts from even the slightest press of examination. Those states that have directly considered the issue have reached the same conclusion reached by the Oregon Supreme Court. The cases on which petitioners rely in their attempt to demonstrate a conflict hold only that state courts will hear section 1983 actions involving tax claims, an unremarkable conclusion with which neither the Oregon Supreme Court nor DOR disagrees.

II. THE DECISION OF THE OREGON SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioners rely on *Felder v. Casey*, 487 U.S. 131 (1988) and *Patsy v. Board of Regents*, 457 U.S. 496 (1982) for the proposition that they need not exhaust their administrative remedies before filing a section 1983 claim. In general, of course, that assertion would be correct. Tax, however, is different. While section 1983 represents a considered congressional choice to intrude federal authority into the normal sphere of state power,

both Congress and this Court consistently and without exception have recognized that, subject to ultimate federal review for constitutionality by this Court, states are free to fashion their own rules for collecting the revenues necessary for the operation of state government. *See Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102-03 (1981) (discussing the Tax Injunction Act, 28 U.S.C. § 1341, and the history of federal non-interference with state systems of taxation).

Where state procedures include the requirement of exhaustion of adequate administrative remedies as a prerequisite to challenging those tax laws, the federal government — acting through both this Court and the Congress — consistently has chosen to defer to that choice. For example, in *First National Bank of Greeley v. Board of County Commissioners of the County of Weld*, 264 U.S. 450 (1923), the plaintiff sought to recover taxes previously paid, asserting they had been levied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The district court sustained the defendants' demurrer and dismissed. This Court affirmed.

> We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards, and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of the opinion that this contention must be upheld.

264 U.S. at 453. Numerous decisions of this Court are in accord. *E.g. Gorham Manufacturing Co. v. State Tax Commission*, 266 U.S. 265 (1924); *McGregor v. Hogan*, 263 U.S. 234 (1924); *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923); *Farncomb v. Denver*, 252 U.S. 7 (1920). In each of these cases the Court held that the party challenging the

state tax *must* exhaust available and adequate state administrative remedies.

The Court has consistently recognized that pursuing administrative remedies as a prerequisite to judicial relief is an essential part of the design of many states' revenue systems.

> The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules.

McNary, 454 U.S. at 108 n. 6, *quoting Perez v. Ledesma*, 401 U.S. 82, 128 n. 17 (1971), (Brennan, J., concurring in part and dissenting in part) as a "cogent explanation" for the reasons underlying federal noninterference. The Tax Injunction Act, 28 U.S.C. § 1341, is congruent with the decisions of this Court in recognizing that the states must be left free to fashion a coherent system of revenue collection or face fiscal chaos. *See California v. Grace Brethren Church*, 457 U.S. 393 (1982) (*Grace Brethren*). As the Court noted in *Grace Brethren*:

> If federal declaratory relief were available to test state tax assessment, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Grace Brethren, 457 U.S. at 410 *quoting Perez v. Ledesma*, 401 U.S. at 128 n. 17 (Brennan, J., concurring in part and dissenting in part).

In *Felder* the Court recognized that Congress was free to impose exhaustion requirements on section 1983 plaintiffs if it chose to do so. 487 U.S. at 148-49. In *McNary*, *supra*, the four member concurrence, written by the author of *Felder*, squarely concluded that the history of the Tax Injunction Act demonstrated a considered Congressional purpose to limit the availability of challenges to state tax statutes brought under section 1983 to those in which administrative remedies had been exhausted.[6]

To be sure, as petitioners argue strenuously, the Tax Injunction Act applies to federal courts. The Act's history, however, demonstrates a broader purpose. As this Court noted in *Grace Brethren*, in enacting the Tax Injunction Act, Congress expressly relied upon the Congressional purpose underlying the Johnson Act of 1934, 26 U.S.C. § 1342, which divests the federal district courts of jurisdiction to enjoin the operation of a public utility commission order. *Grace Brethren*, 457 U.S. at 409 n. 22. That history, as cited by the Court, demonstrates that the purpose of the Johnson Act was "to prevent public utilities from going to federal district court to challenge state administrative orders or to avoid state administrative and judicial proceedings." *Ibid.* The remarks from the Congressional debates reported by the Court demonstrate that Congress intended "to give [the utilities] their rights in every instance to the trial of the question of fact first before the public utility commission." That trial before the administrative agency was to occur "without interference of Federal law." *Ibid.* remarks of Reps. Mapes and Lewis, 78 Cong. Rec. 1916, 1918, 8324 (1934).

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[6]Although the majority in *McNary* based its decision on grounds of comity, nothing in that majority suggests disagreement with the concurrence's view of the intent of the Congress in enacting the Tax Injunction Act.

This legislative history and the rationale underlying this Court's cases deferring to state revenue procedures point up the single most obvious failing of petitioners' argument, a failing petitioners resolutely refuse to address: It is no less intrusive into state revenue collection procedures for a federal statute to require state courts to bypass administrative remedies mandated by state law than it would be for federal courts to bypass those remedies themselves.

The decisions reveal an unbroken history of federal deference to individual state choices in the manner of operating their own revenue systems and the unquestioned recognition that federal review of state taxation is not governed by the same rules by which the federal government oversees other aspects of state business. Seeking to avoid this clear line of authority, petitioners rely almost exclusively on cases that do not involve taxation. Petitioners' narrow focus on *Felder* and *Patsy* enables them to ignore the principles underlying the Tax Injunction Act and the lengthy judicial history of federal noninterference in state methods of tax collection. Interpreting section 1983 to require state courts to bypass state revenue systems would be completely inconsistent with more than a century of considered federal choice to require those who wish to challenge a state's tax system to follow state administrative procedures as long as those procedures are adequate to protect federal rights. The Oregon Supreme Court's opinion pointed out to petitioners that their argument was inherently inconsistent with this Court's tax jurisprudence.

> We understand *McNary* to hold that, given the prime importance of noninterference with state taxing practices, Congress' purpose in enacting 42 USC § 1983 will not be defeated by requiring that complaining taxpayers first

> exhaust their state administrative remedies. If Congress' purpose will not be defeated by such a requirement in federal court, we cannot see how those purposes would be any more thwarted by imposition of precisely the same kind of procedural requirement when the § 1983 action is brought in state court.

Nutbrown v. Munn, 311 Or. at 341; Pet. Cert. App. 15a; *accord LaSalle National Bank v. Rosewell*, 604 F.2d 530, 538-39 (7th Cir. 1979), *rev'd on other grounds*, 450 U.S. 503 (1981); *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d at 80.

Using a federal statute to force the state courts to do that which both this Court and the Congress have recognized to be extremely destructive to the state's ability to manage its fiscal affairs would be no less intrusive than simply allowing the federal courts to entertain those cases in the first instance. Any court should be reluctant to defeat the Congressional intent underlying the enactment of the Tax Injunction Act by such a logically inconsistent interpretation. *See United States v. American Trucking Associations*, 310 U.S. 534 (1940). Petitioners' failure to address this critical issue despite the Oregon Supreme Court's pointed remarks is a measure of the weakness of their analysis and of their unwillingness to come to grips with the real issues in the case.[7]

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[7]Moreover, the engine driving *Felder* is the principle that the choice of state versus federal court should not be outcome determinative in any particular case. 487 U.S. at 138-41. Unlike other section 1983 claims, that principle simply has no application to tax cases because, except for ultimate review by this Court, the federal courts cannot entertain section 1983 actions in tax cases. *McNary*, *supra*. That is, the outcome of petitioners' claim in federal court would necessarily be dismissal if the state remedies are adequate. The state courts, by contrast, will hear those cases after exhaustion of

(continued...)

III. PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

The remainder of petitioners' arguments are makeweight assertions with little to commend them other than petitioners' willingness to repeat them despite their demonstrable lack of legal or factual support. For example, permeating petitioners' arguments is the assertion that the Oregon Supreme Court's decision deprives petitioners of the opportunity to pursue their claims in the state courts. *See e.g.* Pet. Cert. 8-9, 11 n. 14, 22-24. That assertion, occasionally cast as a claim that the exhaustion requirement clothes the individual defendants with immunity, is simply wrong. The Oregon Supreme Court left no doubt that the courts of Oregon are available to petitioners to pursue their section 1983 claims if they remain dissatisfied after they have exhausted their administrative remedies. *See Nutbrown v. Munn*, 311 Or. at 342-43 and n. 8; Pet. Cert. App. 17a.[8]

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[7](...continued)
administrative remedies. Thus, state and federal courts will necessarily differ in their treatment of these cases. As a result, the central principle of the *Felder* opinion is simply inapplicable to this tax case and, contrary to petitioners' argument, *Felder* is not dispositive of the analysis; it is, rather, largely irrelevant to it.

[8]Petitioners' defamatory suggestion that Director Munn would "manipulate" the administrative process in order to cause the statute of limitations to run, Pet. Cert. 11 n. 14, is supported only by petitioners' determined efforts to claim that the state's administrative process is designed to deny them the very remedies that process seeks to deliver quickly and economically. Moreover, Oregon law provides that if DOR does not resolve a taxpayer's claim within nine months, the taxpayer may proceed directly to the tax court without waiting for further action by DOR. Or. Rev. Stat. § 305.560(5). (All Oregon statutes referred to in this brief are reproduced in the appendix.)

Petitioners' claims that their administrative remedies are inadequate are equally insubstantial. Petitioners assert that the administrative remedy is not adequate because DOR cannot declare a statute unconstitutional, a claim squarely refuted by state law; because any monetary relief awarded by DOR would not be against the defendants in their individual capacities, a claim with no relevance to the adequacy of the remedy; and because the administrative remedy is, in their words, burdensome, a claim refuted by this Court's cases. Finally they argue that resort to the administrative remedy would be a futile, a claim also squarely refuted by this Court's cases.

1. Petitioners' argument that DOR could not determine the constitutionality of the statute they challenge is incorrect as a matter of settled Oregon law. As the Oregon Supreme Court reaffirmed in this opinion, Oregon administrative agencies have the authority and responsibility to determine and declare the constitutionality of statutes as applied to the cases presented to them. *Nutbrown v. Munn*, 311 Or. at 346; Pet. Cert. App. 21a-22a; *Employment Division v. Rogue Valley Youth For Christ*, 307 Or. 490, 770 P.2d 588 (1989); *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358, 723 P.2d 298 (1986), *cert. denied* 480 U.S. 942 (1987).[9]

2. Petitioners also assert that their administrative remedy is inadequate because DOR has no authority to award damages against the defendants in their individual capacities. Petitioners cite no reason or authority, and DOR is aware of none, that

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[9]In addition, Oregon law in effect at the time the Tax Court issued its decision dismissing plaintiffs' claims authorizes DOR to "issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it." Or. Rev. Stat. § 305.105.

would render administrative relief inadequate because that relief is paid out of one pocket rather than another. Petitioners do not suggest that DOR lacks the authority to grant them the refunds they seek if they are indeed entitled to those refunds. Moreover, Oregon indemnifies its officials for damages awarded against them for actions taken in the course and scope of their employment. Or. Rev. Stat. § 30.285. Thus, if petitioners prevail, they will be paid with state funds in any event. Under petitioners' view, due process would permit any person to evade state or federal requirements of exhaustion of administrative remedies merely by naming the head of the administrative agency as a defendant. Petitioners cite no support for this extravagant claim.[10]

3. Petitioners' assertion that the administrative remedy is inadequate because it is "burdensome" ignores this Court's decisions in *Grace Brethren*, *supra*, and *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). Those cases considered the adequacy of state remedies in the context of efforts by taxpayers to evade the bar of the Tax Injunction Act.[11] They held that the adequacy of state remedies is a procedural issue: if the state

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[10]The indemnification statute also answers petitioners' strained claim that requiring them to exhaust their administrative remedies would deny them due process because of defendant Munn's "direct pecuniary interest in this lawsuit." Pet. Cert. 19-20.

[11]The Tax Injunction Act prohibits enjoining state tax administration except where the state remedy is not "plain, speedy and efficient." The principles of comity on which the *McNary* majority relied require initial resort to state remedies unless they are not "plain, adequate, and complete." *McNary*, 454 US at 116. The *McNary* Court could "discern no significant difference, for purposes of the principles recognized in this case," between the two standards. *Id.* n. 8. Petitioners do not suggest that some other standard would properly govern this Court's determination of the adequacy of the state remedies in this case.

provides the opportunity for full factual hearing followed by judicial review, the state procedure is adequate. *Grace Brethren*, 457 U.S. at 411-13; *Rosewell*, 450 U.S. at 512-25.

Examining the language and history of the Tax Injunction Act in *Rosewell*, the Court concluded that the requirement of a "plain, speedy and efficient" remedy referred only to the *procedural adequacy* of the remedy. 450 U.S. at 512-525. A state remedy is adequate if the taxpayer had a "full hearing and judicial determination of the controversy." 450 U.S. at 514, *quoting* S. Rep. No .701, 72d Cong., 1st Sess., 2 (1932). The Court stated:

> There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax. . . . Appeal to the higher Illinois courts is authorized . . . and review is ultimately available in this Court . . . . Respondent does not allege any procedural defect in the Illinois remedy, other than delay, . . . that would preclude preservation and consideration of her federal rights, since she is free to raise her equal protection and due process federal objections during the Application for Judgment proceedings before the Circuit Court of Cook County.

450 U.S. at 514-15 (citations omitted).

The delay in coming to court, if any, caused by the exhaustion requirement does not render the administrative process inadequate. Indeed, the Illinois remedies considered in *Rosewell* were far more burdensome than those of which petitioners complain, resulting in delays of over two years at a time to obtain relief for repeated and egregious overassessment. Moreover, the Illinois system provided no interest to the ultimately victorious taxpayer, unlike the Oregon system. *See* Or. Rev. Stat. §§ 305.220, 305.222, 305.270 and 314.415.

Petitioners focus narrowly on the administrative process, asserting that they have asked for relief not available from the agency. By contrast, in both *Rosewell* and *Grace Brethren* the Court looked not only at the administrative process, but also at the judicial avenues open to the taxpayer dissatisfied with the results obtained in that process to determine whether petitioners had the opportunity for a full hearing and judicial review of their claims. Even though the California administrative agency in *Grace Brethren* lacked authority to declare the challenged statute unconstitutional, 457 U.S. at 413 n. 30, this Court found the state remedies plain, speedy and efficient because they met minimal procedural requirements and provided a full hearing and judicial review. Despite petitioners' attempts to evade the plain meaning of the Oregon Supreme Court's opinion, the Oregon courts provide a judicial forum for consideration and review of all their claims if they remain dissatisfied after availing themselves of the administrative process.[12] The state remedies are adequate.

4. Finally, petitioners assert that resort to administrative remedies would be futile.[13] In *Rosewell*, *supra*, the taxpayer

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[12]Even if the Court's examination were limited solely to the remedies provided by the administrative process, petitioners' argument is obviously flawed. If they were correct, any party could avoid an exhaustion requirement, whether state or federal, by simply asserting a manifestly frivolous claim for a form of relief the agency in question was not authorized to grant.

[13]Descending once again into unsupported attacks on the integrity of the state and its officials, petitioners assert that the gravamen of their action "is that defendants have implemented an unlawful scheme to mislead petitioners and the members of the class whom the petitioners seek to represent for the purpose of extinguishing as many claims as possible." Pet. Cert. 19 n. 27. While petitioners' 25 page "First Amended Class Action Complaint For

(continued...)

alleged that she was over-assessed year after year as the result of a knowing and deliberate policy on the part of the assessor and that she had never gained any relief at the administrative level from the assessor or the Board of Appeals. *See* 450 U.S. at 507-08 and nn. 5 and 6. Nevertheless, the Court, looking to the state system as a whole — including both the administrative and judicial components — found the state system adequate despite the obvious futility in fact of the administrative process.

Petitioners apparently contend that the mere assertion in their complaint that resort to administrative remedies would be futile is sufficient to justify bypass of those remedies. If that were correct, virtually all exhaustion requirements would be subject to immediate nullification in a swarm of original complaints brought under section 1983 and asserting, without basis in law or fact, that administrative remedies would be futile. In this respect, petitioners' futility claim is the same as their argument that the administrative remedy is inadequate, and it fails for the same reasons.

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[13](...continued)
Declaratory Judgment" unquestionably claims that defendants are enforcing against petitioners laws claimed to be unconstitutional, DOR's examination of that complaint reveals no assertion that defendants have attempted to mislead plaintiffs or to extinguish any claims. Petitioners' consistent attempts to vilify the state and its officers before the Court should be a clear signal to the Court that they seek to mask their inability to present a valid legal analysis.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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APPENDIX A

30.285 Public body shall indemnify public officers; procedure for requesting counsel; extent of duty of state; obligation for judgment and attorney fees. (1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1)) of this section do not apply in case of malfeasance in office or wilful or wanton neglect of duty.

(3) If any civil action suit or proceeding is brought against any state officer, employee or agent which on its face falls within the provisions of subsection (1) of this section, or which the state officer, employee or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employee or agent may, after consulting with the Department of General Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employee or agent unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or wilful or wanton neglect of duty, in which case the Attorney General shall reject defense of the claim.

(4) Any officer, employee or agent of the state against whom a claim within the scope of this section is made shall

cooperate fully with the Attorney General and the department in the defense of such claim. If the Attorney General after consulting with the department determines that such officer, employee or agent has not so cooperated or has otherwise acted to prejudice defense of the claim, the Attorney General may at any time reject the defense of the claim.

(5) If the Attorney General rejects defense of a claim under subsection (3) of this section or this subsection, no public funds shall be paid in settlement of said claim or in payment of any judgment against such officer, employee or agent. Such action by the Attorney General shall not prejudice the right of the officer, employee or agent to assert and establish an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or willful or wanton neglect of duty, in which case the officer, employee or agent shall be indemnified against liability and reasonable costs of defending the claim, cost of such indemnification to be a charge against the Insurance Fund established by ORS 278.425.

(6) Nothing in subsection (3), (4) or (5) of this section shall be deemed to increase the limits of liability of any public officer, agent or employee under ORS 30.270, or obviate the necessity of compliance with ORS 30.275 by any claimant, nor to affect the liability of the state itself or of any other public officer, agent or employee on any claim arising out of the same accident or occurrence.

(7) As used in this section, "state officer, employee or agent" includes district attorneys and deputy district attorneys,

special prosecutors and law clerks of the office of district attorney who act in a prosecutorial capacity, but does not include any other employee of the office of district attorney or any employee of the justice, district or circuit courts whose salary is paid wholly or in part by the county.

305.560 Procedure on appeal from order of department; procedure where taxpayer is not appellant; effect of failure to notify person appealing. . . . .

. . . .

(5) If the department fails to notify a person appealing to the director pursuant to this chapter within nine calendar months following the month in which the appeal is filed of its determination of the appeal, the person may treat the appeal as denied, and bring suit in the tax court by filing an original and one certified copy of a complaint against the department in the court. Such filing in the tax court shall constitute the perfection of the appeal. Service upon the department shall be accomplished in the same manner as provided in subsection (1) of this section.

305.105 Declaratory rulings by department. The Department of Revenue in its discretion may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. The department shall prescribe by rule the form, content and procedure for submission, consideration and disposition of such petitions. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the department and all parties to the proceedings on the state of facts alleged, unless

it is altered or set aside by a court. A ruling shall be subject to review in the Oregon Tax Court and Supreme Court in the manner provided by ORS 305.445.

305.220 Interest on deficiency, delinquency or refunds; adjustments in rates; computation. (1) Unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every deficiency or delinquency arising under any law administered by the Department of Revenue shall bear simple interest at the rate of five-sixths of one percent per month or fraction thereof.

(2) Unless specifically provided otherwise by statute or by rule of the director adopted pursuant to subsection (3) of this section, every refund arising under any law administered by the Department of Revenue shall:

(a) Bear interest at the rate of one percent per month, or fraction thereof, for interest periods beginning prior to June 1, 1983.

(b) Bear interest at the rate of one and one-half percent per month, or fraction thereof, for interest periods beginning on or after June 1, 1983, and prior to January 1, 1988, unless an adjustment was made under subsection (3) of this section in which case the adjusted interest rate shall be used for the period for which the adjustment was made.

(c) Subject to subsections (3) and (5) of this section and ORS 305.222, bear interest at the rate of five-sixths of one percent per month, or fraction thereof, for interest periods beginning on or after January 1, 1988.

(3)(a) If the director determines that the rates of interest for deficiencies, delinquencies and refunds established in subsections (1) and (2) of this section are at least one percentage point more or less than the prevailing rates of interest established by the Internal Revenue Service for underpayments arising under the federal tax laws to which one percentage point has been added, the director may adopt, by rule, adjusted interest rates. The director shall not adopt adjusted interest rates more than once in a calendar year. Notice of intent to adopt adjusted interest rates shall be given in the manner provided in ORS 183.335, not less than three months before the proposed effective date of the adjusted rates.

(b) In establishing the adjusted interest rates to be adopted under this subsection:

(A) The director shall take into consideration the current interest rates established by the Internal Revenue Service for underpayments arising under the federal tax laws.

(B) To any interest amount determined by taking into consideration the current interest rates established by the Internal Revenue Service for underpayments under subparagraph (A) of this paragraph, which interest amount shall be expressed at a rate per month or fraction thereof, there shall be added one-twelfth of one percent.

(4)(a) If the director adopts an adjusted interest rate for deficiencies and delinquencies for any interest period beginning prior to June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is six percentage points below the adjusted interest rate for deficiencies and delinquencies for the same period.

(b) If the director adopts an adjusted interest rate for deficiencies and delinquencies for an interest period beginning on or after June 1, 1983, the director shall adopt an adjusted interest rate for refunds that is equal to the adjusted interest rate for deficiencies and delinquencies.

(5) Any change in the rate of interest applicable to deficiencies, delinquencies or refunds resulting from the adoption of adjusted interest rates by the director under this section shall apply to deficiencies, delinquencies and refunds outstanding on the effective date of the rule, or arising on or after that date, but only with respect to interest periods beginning on or after that date.

(6) If the rate of interest on a deficiency, a delinquency or a refund is governed by this section, and if a fraction of a month is involved in making the computation of interest on the deficiency, delinquency or refund, then for the fractional month, the simple interest otherwise provided shall be computed on a daily basis.

305.222 Determination of interest rate. For purposes of determining the interest rate established under ORS 305.220:

(1) In the case of a refund of tax ordered by the Oregon Tax Court or the Oregon Supreme Court and arising under any law administered by the Department of Revenue, if the refund is not paid by the department within 60 days after the date of the order, the interest rate provided under ORS 305.220 shall be one-third of percent greater than that so provided under ORS 305.220, but only with respect to interest periods that begin 60 days after that date the order is entered.

(2) In the case of a notice of assessment, or an assessment under ORS 305.265 (12), pursuant to any law administered by the department, if the deficiency or delinquency is not paid within 60 days after the date of the notice of assessment or the assessment, the interest rate provided under ORS 305.220 shall be one-third of one percent greater than that so provided under ORS 305.220, but only for periods beginning after 60 days after the date of notice of assessment or assessment under ORS 305.265 (12), whichever is applicable.

(3) If the deficiency or delinquency is appealed to the department or in a hardship situation to the Oregon Tax Court without prior payment of tax, then notwithstanding subsection (2) of this section, the increased rate of interest shall commence only for interest periods beginning after a 60-day period after the date that the order of the department, the Oregon Tax Court or the Oregon Supreme Court affirming the deficiency or delinquency is entered.

305.270 Refund of excess tax paid; claim procedure. (1) Except as provided in ORS 118.100, if the amount of the tax shown as due on a report or return originally filed with the department with respect to a tax imposed under ORS chapter 118, 119, 308, 310, 314, 316, 317, 318 or 321, or collected pursuant to ORS 305.620, or as corrected by the department, is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department under such laws within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415.

(2) The claim shall be made on a form prescribed by the department, except that an amended report or return showing a refund due and filed within the time allowed by this subsection for the filing of a claim for refund, shall constitute a claim for refund. The claim shall be filed within the period specified in ORS 314.415 (1)(b) for taxes imposed under ORS chapters 310, 314, 316, 317 and 318, or collected pursuant to ORS 305.620 (except where any applicable ordinance specifies another period), within three years from the payment of the tax for taxes imposed under ORS chapter 118 or 119 and within two years of the payment of any tax under ORS chapter 308 or 321.

(3) Upon receipt of a claim for refund, or original report or return claiming a refund, the department shall either refund the amount requested or send to the claimant a notice of any proposed adjustment to the refund claim, stating the basis upon which the adjustment is made. A proposed adjustment may either increase or decrease the amount of the refund claim or result in the finding of a deficiency. If the proposed adjustment results in a determination by the department that some amount is refundable, the department may send the claimant the adjusted amount with the notice.

(4) The claimant may, within 30 days of the date of the notice of proposed adjustment, advise the department in writing of objections to the refund adjustment and may request a conference with the department, which shall be held within one year of the date of the notice. The department shall notify the claimant of a time and place for the conference, and appoint a conference officer to meet with the claimant for an informal discussion of the claim. After the

conference, the conference officer shall send to the claimant, by certified mail, a determination of the matter, and include therewith either a notice of refund denial or payment of any amount found to be refundable, together with any applicable interest provided by this section. If the conference officer determines that a deficiency exists, the officer shall include a notice of assessment with the determination.

(5) If no conference is requested, and the adjustments have not resulted in the finding of a deficiency, the following shall apply:

(a) If written objections have been made by the claimant, the department shall consider the objections, determine any issues raised and send the claimant a notice of refund denial or payment of any amount found to be refundable, together with any interest provided by this section.

(b) If no written objections are made, the notice of any proposed adjustment shall be final after the period for requesting a conference or filing written objections has expired.

(6) If no conference is requested, and the notice of proposed adjustment has asserted a deficiency, the department shall consider any objections made by the person denied the refund, make a determination of any issues raised, pay any refunds found due, with applicable interest, or assess any deficiency and mail a notice thereof within one year from the date of the notice of deficiency, unless an extension of time is agreed upon as described in subsection (7) of this section.

(7) If, prior to the expiration of any period of time prescribed in subsection (6) of this section for giving of notice of assessment, the department and the person consent in

writing to the deficiency being assessed after the expiration of such prescribed period, such deficiency may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period agreed upon.

(8) If the department refunds the amount requested as provided in subsection (3) of this section, without examination or audit of the refund claim, the department shall give notice of this to the claimant at the time of making the refund. Thereafter, the department shall have one year in which to examine or audit the refund claim, and send the notice of proposed adjustment provided for in subsection (3) of this section, in addition to any time permitted in ORS 314.410 or 314.415.

(9) The failure to hold a requested conference within the one-year period prescribed in subsection (4) of this section shall not invalidate any assessment of deficiency made within the one-year period pursuant to subsection (8) of this section or within any extension of time made pursuant to subsection (7) of this section, but shall invalidate any assessment of interest or penalties attributable to the deficiency. After an assessment has been made, the department and the person assessed may still hold a conference in accordance with ORS 305.115 (7) within 90 days from the date of assessment. If a conference is held, the 90-day period under ORS 305.280 (2) shall run from the date of the conference officer's written determination of the issues.

(10) The claimant may appeal any notice of proposed adjustment, refund denial or notice of assessment in the

manner provided in ORS 305.280. The failure to file written objections or to request or have a conference shall not affect the rights of appeal so provided. All notices and determinations shall set forth rights of appeal.

314.415 Refunds; interest; credits. (1)(a) If the department determines pursuant to ORS 305.270 that the amount of the tax due is less than the amount theretofore paid, the excess shall be refunded by the department with interest at the rate established under ORS 305.220, for each month or fraction of a month during a period beginning 45 days after the due date of the return or the date the tax was paid, whichever is the later, to the time the refund is made.

(b) No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions, of the return in respect of which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year. If the tax owed is less than $1, no refund shall be made.

(c) No interest on a refund to an employee of a tax withheld by an employer shall be paid for any period prior to the time the employee filed a personal income tax return for

the tax year involved, nor for any period prior to the day which is 45 days after the date when the employee's annual return for that year was filed or was due, whichever is the later.

(d) No interest on a refund of estimated tax paid under ORS 314.505 to 314.525 or 316.557 to 316.589 shall be paid for any period prior to the time the taxpayer filed a tax return for the tax year involved, nor for any period prior to the day which is 45 days after the date when the tax return for that year was filed or was due, whichever is later.

(e) The amount of the refund, exclusive of interest thereon, shall not exceed the portion of the tax paid during such period preceding the filing of the claim or, if no claim is filed, then during the period preceding the allowance of the refund during which a claim might have been filed. Where there has been an overpayment of any tax imposed, the amount of the overpayment and interest thereon shall be credited against any tax, penalty or interest then due from the taxpayer, and only the balance shall be refunded.

(f) Except as provided in ORS 305.265 (12), if, pursuant to a notice of deficiency or assessment, the taxpayer pays the amount specified in the notice, or any part thereof, and if, upon appeal, the department, the Oregon Tax Court or the Oregon Supreme Court orders that all or any part of the deficiency amount specified in the notice and paid by the taxpayer be refunded, the amount so ordered to be refunded shall bear interest at the rate established for refunds in ORS 305.220. Interest shall be computed from the date of payment to the department. Nothing in this paragraph shall require that interest be paid upon any amount for any period for which

interest upon the same amount for the same period is required to be paid under ORS 305.419.

(2) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270 or subsection (1) of this section, if, prior to the expiration of the period prescribed in paragraph (b) of subsection (1) of this section, the department and the taxpayer consent in writing to the refund of tax after the expiration of the period prescribed, the refund shall be made at any time prior to the expiration of the period agreed upon and no refund shall be made or allowed after the expiration of the period agreed upon unless a claim for refund is filed by the taxpayer before the expiration of the period agreed upon in compliance with the manner prescribed by the department. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The department shall have the power to consent to such refund only where the taxpayer has consented to assessment of additional tax, if such be determined upon audit, after the expiration of the applicable three-year or five-year period prescribed in ORS 314.410 (1) and (2).

(3) If the claim for credit or refund relates to an overpayment on account of the deductibility by the taxpayer of the worthlessness of a share of stock in a corporation, of the right to subscribe for or to receive a share of stock in a corporation, or of a debt, in lieu of the three-year period of limitation prescribed in subsection (1) of this section, the period shall be seven years from the date prescribed by law for the filing of the return for the year with respect to which the claim is made; provided, that if the claim is made in reliance upon this

subsection after the expiration of the three-year period prescribed in paragraph (b) of subsection (1) of this section, no interest shall be allowed with respect to any credit or refund determined to be due upon such claim for the period beginning at the close of the three-year period prescribed in subsection (1) of this section and ending at the expiration of six months after the date on which the claim is filed.

(4)(a) If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, in lieu of the three-year period of limitation prescribed in subsection (1) of this section, the period shall be that period which ends with the expiration of the 15th day of the 40th month following the end of the taxable year of the net operating loss which results in such carryback; except that and with respect to an overpayment attributable to the creation of, or an increase in, net operating loss as a result of the elimination of excessive profits by a renegotiation (as described under sections 1211 to 1233, Title 50, United States Code), the period shall not expire before the expiration of the 12th month following the month in which the agreement or order for the elimination of such excessive profits becomes final, whichever is the later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in paragraph (a) or (b) of subsection (1) of this section or subsection (2) of this section, whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback. If the allowance of a credit or refund of an overpayment of tax attributable to a net operating loss carryback is otherwise prevented by the operation of any law or rule of law other than ORS 305.150,

relating to closing agreements, such credit or refund may be allowed or made, if claim therefor is filed within the period provided in this subsection. To the extent that the net operating loss carryback was not an issue in any proceeding in which the determination of a court, including the Oregon Tax Court, has become final, the claimed credit or refund applicable to that net operating loss carryback may be allowed or made under this subsection.

(b) For purposes of subsection (1) of this section, if any overpayment of tax results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the later of:

(A) The due date of the return for the taxable year in which such net operating loss or net capital loss arises;

(B) The date the return for the year in which the net operating or net capital loss arises is filed; or

(C) The date of filing of the return for the year to which the net operating loss or net capital loss is carried back.

(5) Notwithstanding any provision to the contrary in ORS 305.265 or 305.270, or other provisions of this section, if the taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in federal income tax for any year, the period within which a claim for credit or refund may be filed or credit or refund allowed or made if no claim is filed shall be the period provided within subsections (1) to (4) of this section or six months after the date of the expiration of the agreed period for assessing deficiency in federal income tax, whichever period expires the later.

(6) The department may make separate refunds of withheld taxes upon request by a husband or wife who has filed a joint return, the refund payable to each spouse being proportioned to the gross earnings of each shown by the information returns filed by the employer or otherwise shown to the satisfaction of the department.

(7) If a taxpayer entitled to a refund under subsection (1) of this section dies, the department may issue a draft for payment of such refund under the terms and conditions set out in ORS 293.490 to 293.500 exercising the same powers and subject to the same restrictions pursuant to which the State Treasurer is authorized to pay the amounts of warrants, checks or orders under those statutes.

(4)

No. 91-457

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN S. NUTBROWN, *et al.*,
Petitioners,

v.

RICHARD A. MUNN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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January 2, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-457

EDWIN S. NUTBROWN, *et al.*,
Petitioners,

v.

RICHARD A. MUNN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE CONFLICT IS WIDENING

A. States

Avoiding the importance of the distinct federal questions presented, respondents urge a denial of the petition on the basis that there is no state conflict. However, a casual examination of the commentators establishes both the importance of the questions presented by this petition and the conflict among the states' highest courts. *See, e.g.*, Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888 (1990); Yuengert, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax*

Challenges Under Section 1983 of the Civil Rights Act of 1871?, 45 Washington and Lee L. Rev. 381 (1988); Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414 (1985).

The decisional law of Mississippi illustrates this conflict. In *State Tax Comm'n v. Fondren*, 387 So. 2d 712 (Miss. 1980), *cert. denied, sub nom., Redd v. Lambert*, 450 U.S. 1040 (1981), the Mississippi Supreme Court refused to entertain a challenge to a state tax brought under 42 U.S.C. § 1983, reasoning that because of the Tax Injunction Act's bar on federal court jurisdiction, taxpayers were required to exhaust state remedies. *Id.* at 723. The basis of the holding in *Fondren* is indistinguishable from the holding in *Nutbrown*. However, after this Court's decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Mississippi Supreme Court overruled *Fondren*, expressly holding that *Fondren* confused a federal court jurisdictional limitation "with the enforceability of a federally created right and remedy in state court." *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 864 (Miss. 1988).[1]

B. *Hafer v. Melo*

Respondents reassert the argument adopted by the court below that they are, in effect, immune from suit for "individual" liability for acts committed in the course of their "official" capacity because of the existence of a state remedy.[2] Respondents' argument is indistinguish-

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[1] *See also* the *Davis*-related case of *Barker v. State of Kansas*, No. 91-611, *cert. granted* (November 27, 1991), where the trial court rejected the assertion of an exhaustion requirement similar to that imposed by Oregon.

[2] Indeed, contrary to the assertion of the respondents, the state cases relied upon by the court below, rather than uphold the obligation of state courts to entertain actions brought pursuant to 42 U.S.C. § 1983, held that state remedies may displace the independent remedy created by Congress. *See, e.g., Zizka v. Water Pollution*

able from similar arguments rejected by this Court in *Hafer v. Melo*, —— U.S. ——, 112 S. Ct. 358 (1991). It held that the distinction urged "finds no support in the broad language of § 1983." *Id.* at 363. It also held that this "distinction cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties." *Id.* The Court also rejected arguments similar to the concerns of federalism advanced here by respondents, noting that " 'it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.' " *Id.* at 364. (citation omitted). Thus, under *Hafer*, the respondents may be held individually liable under section 1983 for acts performed in the course of their official duties. The decision of the Oregon Supreme Court in *Nutbrown*, which immunizes respondents from suit for personal liability under section 1983 because of the existence of a state remedy, cannot be reconciled with *Hafer*. Petitioners contend that this significant conflict, alone, warrants review and reversal of *Nutbrown* by this Court.

C. *Howlett v. Rose*

Respondents also contend that the petitioners are not entitled to declaratory and injunctive relief even though the respondents continue to enforce the discriminatory scheme for liabilities attributable to federal pensions paid after this Court's decision in *Davis v. Michigan Dep't of*

Control Authority, 195 Conn. 682, 490 A.2d 509 (1985); *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986). In sharp contrast, the holding of the Mississippi Supreme Court in *Burrell* is consistent with the settled principles recognized by the decisions of this Court. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961) (holding that a state remedy need not be first sought and refused before the section 1983 remedy is invoked); *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 869 (1991) (reaffirming that section 1983 provides a broadly construed remedy against *all* forms of official violation of federally protected rights).

Treasury, 489 U.S. 803 (1989). However, respondents do not explain the basis upon which such relief sought under § 1983 can be subjected to a condition of exhaustion when the identical form of relief for a purely state question is available in the Tax Court without resort to exhaustion. *See* Petition at 12 n.15, 17 n.25. Even if the respondents' arguments otherwise had merit, it is beyond dispute that Oregon may not discriminate against this federal cause of action. *See Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2440 (1990) (reaffirming that a state may not discriminate against federal causes of action).[3] Moreover, respondents ignore this Court's decision in *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 870 (1991), which makes clear that petitioners "may sue and obtain injunctive and declaratory relief" under section 1983 with respect to tax matters.

II. THERE IS NO IMPLIED REPEAL OF § 1983

In the decision below, the Oregon Supreme Court legislated a result which is plainly at odds with the express will of Congress and the prior pronouncements of this Court. Ignoring the important federal questions presented and the significant role of *stare decisis* in our system of jurisprudence, the respondents assert that review should be denied on the basis of their policy views.[4]

The court below concluded that a taxpayer's right to the independent remedy of section 1983 had been *impliedly*

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[3] Petitioners respectfully note that the existence of the settled state right to declaratory relief for state questions undercuts the respondents' assertions that recognition of a section 1983 cause of action would be intrusive upon state concerns.

[4] The policy considerations of interference asserted here by the respondents and adopted by the court below are illusory. Respondents' real complaint is not about section 1983, but rather the breadth of the underlying constitutional rights sought to be vindicated in this case. *See* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 22 (1985).

repealed by the Tax Injunction Act, 28 U.S.C. § 1341. In so ruling, it ignored the holdings of this Court which disfavor implied repeals and which require clear evidence of congressional intent to do so. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Adickes v. S.H. Krees & Co.*, 398 U.S. 144 (1970). *Cf. Johnson v. Robison*, 415 U.S. 361, 373 (1974) (clear and convincing evidence of congressional intent is required before a statute will be construed to restrict access to judicial review). *See also* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 27 (1985).

In carving out an exception to section 1983, premised on the Tax Injunction Act, the court below also ignored that "the purpose of a statute includes not only what it sets out to change, *but also what it resolves to leave alone.*" *West Virginia University Hosp., Inc. v. Casey*, —— U.S. ——, 111 S. Ct. 1138, 1147 (1991) (emphasis added). The Tax Injunction Act is a neutral limitation upon the jurisdiction of federal courts. It does not limit in any way the federally created right and remedy of section 1983 in state court.

Contrary to the conclusion of the Oregon Supreme Court, the Tax Injunction Act was specifically intended to cure the abuse of out-of-state corporations invoking the equity powers of the federal courts to interfere in state tax disputes "[a]nd all the time in this dispute there is no Federal question involved." 81 Cong. Rec. 1417 (1937).[5] *See also* S. Rep. 1035, 75th Cong., 1st

[5] Respondents' contentions regarding the Tax Injunction Act are also premised upon an underlying assumption which is contrary to historical fact. At the time the Tax Injunction Act was passed, section 1983 claims such as those at issue in this case had to be brought in state court. At that time, federal courts only had jurisdiction over taxpayer section 1983 claims which satisfied, *inter alia*, the amount-in-controversy requirement. *See* H.R. Rep. No. 1503,

Sess. 2 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess. 2-3 (1937). Senator Bone, the legislation's sponsor, "emphasized . . . that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court." 81 Cong. Rec. 1416.

The Act's legislative history explicitly recognized that one of the existing rights of taxpayers was the exception permitting the enjoining of state and county taxes where the "tax law is invalid." H.R. Rep. No. 1503 at 2. Given the unequivocal intent of Congress "*not to take away any equitable right*," it is simply inconceivable that Congress intended to extinguish the obligations of state courts to enforce the rights expressly conferred by section 1983 and established by this Court's decisions. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Atchison & C. Ry. Co. v. O'Connor*, 223 U.S. 280 (1912). *Cf. Mitchum v. Foster*, 407 U.S. 225 (1972) (section 1983 is an Act of Congress that falls within the expressly authorized exception to the federal anti-injunction statute of 28 U.S.C. § 2283).[6] Indeed, if Congress intended to permit the

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75th Cong., 1st Sess. 4 (1937). Accordingly, in enacting the Tax Injunction Act, Congress did nothing to alter or change the obligation of state courts to entertain taxpayer section 1983 claims similar to those in issue here since such claims were not cognizable in the federal courts in the first instance.

[6] There is nothing inconsistent with the enforcement of constitutional rights under the independent remedy of section 1983 and a state's own remedial scheme. *Cf. Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other without a more definite expression in the legislation Congress has enacted. . . ."). This is particularly so when preferring the state scheme over section 1983 is likely to result in the subsequent assertion that the section 1983 remedy is time barred. *Id.* at 466. *See also Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 869 (1991) ("[I]f Congress had intended to limit the 'broad and unqualified' language of § 1983, 'it is not unreasonable to assume that it would have made this explicit.'") (citation omitted).

states to impose exhaustion requirements upon section 1983, its subsequent conclusion that it was carving out a narrow exception to the non-exhaustion rule when it enacted 42 U.S.C. § 1997e was superfluous. Moreover, it was not the province of Oregon to "alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 512 (1982).[7]

In *Felder v. Casey*, 487 U.S. 131 (1988), this Court resolved that Congress has preempted state law exhaustion requirements for actions brought under section 1983. As noted by Justice Blackmun, "[o]ne of the sounder canons of judicial restraint is that once a court has spoken conclusively on a question of statutory interpretation, it should reconsider the question only when faced with compelling evidence that its initial answer was incorrect." *Individual Rights*, 60 NYU L. Rev. at 27.[8]

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[7] Respondents' reliance on their inverted analysis of the Tax Injunction Act is also misplaced. It assumes that the requisites of the Act are satisfied. The respondents have made clear that they will provide no relief unless ordered by a court to do so. TR. 222. A process, which requires that 40,000 elderly citizens separately establish that which the decision of this Court in *Davis* already established, is suspect at best. *See Garrett v. Bamford*, 528 F.2d 63, 71 (3d Cir.), *cert. denied*, 429 U.S. 977 (1976) ("Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the legal remedy and has provided a forum."). In addition, the court below found that the agency had no subject matter jurisdiction over petitioners' claims. *See* Pet. App. A at 20a-21a. Forcing these elderly citizens to exhaust an administrative process before an agency which lacks subject matter jurisdiction to provide the relief sought under section 1983 is equally inadequate. *Direct Marketing Ass'n, Inc. v. Bennett*, 916 F.2d 1451, 1457 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991) ("Certainty that a remedy exists is an important factor in establishing that a state court remedy is 'plain.'") (citations omitted). *See also* Hull, *Uncertainty of State Remedy May Provide Access to Federal Courts*, 1 Journal of Multistate Taxation 135 (1991).

[8] The pre-*Felder*, state court decision of *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986), relied on by the Court

It was error for the court below to presume to overrule *Felder* in substantial part.

III. FUTILITY

The respondents' motion in the trial court was brought pursuant to local rule. Rule 21A is set forth in App. A at 1a. In accordance with that rule, petitioners submitted competent evidence that the respondents would provide no relief unless ordered to do so by a court. *See* Petition at 17-19. The respondents did not refute this evidence.

The decisions of this Court establish that exhaustion is excused where resort to the agency would have been futile. *See City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24 (1934); *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499 (1928). This settled principle applies with particular force where the delay attendant to exhausting the remedy will likely result in the subsequent assertion that a substantial part, if not all, of the federal claim is time barred. *See* note 6, *supra*.

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below, certainly is not compelling evidence that this Court's initial answer in *Felder* was incorrect. Moreover, the result reached by the court in *Linderkamp* cannot be reconciled with this Court's decision in *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865 (1991).

CONCLUSION

For the reasons set forth in the Petition, Supplemental Brief, and this Reply, petitioners respectfully request that their petition be granted and that the decision below be reversed.

Respectfully submitted,

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January 2, 1992

APPENDIX A

RULE 21. DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest (7) failure to join a party under Rule 29., (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until fur-

ther discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.